



1 (Proceedings heard in open court:)

2 THE CLERK: Calling 15 CV 50148, LDGP, LLC vs.  
3 Cynosure, Inc.

4 THE COURT: I'm not doing this by myself.

5 MR. BRUCE: Good morning, Judge.

6 Good morning, Judge. Devon Bruce on behalf of the  
7 Plaintiffs.

8 THE COURT: Good afternoon, Mr. Bruce.

9 MR. HOLEVAS: Good afternoon, your Honor. John  
10 Holevas, also on behalf of Plaintiffs.

11 THE COURT: Good afternoon, Mr. Holevas.

12 MR. GRAVINO: Good afternoon, your Honor. Mark  
13 Gravino here for the Plaintiffs.

14 THE COURT: Good afternoon, Mr. Gravino.

15 MR. SAMORE: Good morning, your Honor. Eric Samore  
16 on behalf of Defendant, Cynosure.

17 THE COURT: Good afternoon, Mr. Samore.

18 MS. LONG: Kate Long, also on behalf of Cynosure.

19 THE COURT: Good afternoon, Ms. Long.

20 Okay. We are here on a big ol' stack of paper.

21 There is, essentially, cross motions to compel. So I have got  
22 Defendant's motion to compel. There is two of them.

23 Plaintiffs' response. Motion for leave to file under seal, I  
24 ruled on that. If it is something that goes into my thought  
25 process, the Seventh Circuit says that it is unsealed.

1           And then the Plaintiffs' motion to compel responses  
2   and the Defendant's response.

3           Sort of a big picture issue, I know you've heard me  
4   say it: I apply the goose-and-gander rule. So if one side is  
5   saying that an issue is relevant and they need it, and the  
6   other side says the same thing, I'm probably going to rule  
7   consistently. It is going to go both ways, all right?

8           Party statements, any statement by a party. Now,  
9   once they are requested, and this has been known, the rule,  
10   for a long time under 26(b)(3)(C), "Previous statement. Any  
11   party or other person may, on request and without the required  
12   showing" -- that's kind of a key point -- "obtain the person's  
13   own previous statement about the action or its subject matter.  
14   If the request is refused, the person may move for a court  
15   order" under Rule 37, and Rule 37 applies for expenses. "A  
16   previous statement," that is either a "written statement that  
17   the person has signed or otherwise adopted or approved or a  
18   contemporaneous stenographic, mechanical" -- I don't know if  
19   that ever happens anymore -- "electrical or other  
20   recording -- or a transcription of it -- that recites  
21   substantially verbatim the person's oral statement." So  
22   those, if anybody has got those, both sides pass them. You  
23   have got to give them.

24           Proportionality, that has been around. It just got  
25   moved forward. So burdensomeness, when that is raised, that

1 kind of hints of proportionality, but I need facts. I need  
2 facts to do the weighing process, to look at all six factors.  
3 So I need facts for certain things.

4 I have got a big issue -- I don't mean that  
5 pejoratively -- an issue that I'm confused about, and I need  
6 to -- we will flesh it out as we proceed. It relates to the  
7 Defendant's inability to identify, essentially, the purchase  
8 price of the machines.

9 MR. BRUCE: Right.

10 THE COURT: And my confusion stems from being alive  
11 for 52 years and being an attorney for 20-something. I have  
12 never purchased -- I have never purchased anything and not  
13 received an invoice, and I have never sold anything and not  
14 given an invoice, and all my clients did the same thing.  
15 Every company I represented in every commercial case, anything  
16 under the UCC, any kind of commercial case, there is always an  
17 invoice. And so we will talk about it, but I'm a little  
18 confused as to why it would be difficult to figure out the  
19 cost of the product, okay?

20 So let me do this: I made an attempt -- well, it is  
21 a little rough, but I made an attempt to try to figure out  
22 what was really at issue as best I could. I wrote "resolved?"  
23 on a whole lot of things.

24 So I don't know if the parties have talked since all  
25 the filings were made. Have you talked at all to try to

1 figure out what is resolved and what is not?

2 MR. BRUCE: No.

3 MR. SAMORE: Well, we did with respect to their  
4 attorney-client assertion and request that they produce a  
5 privilege log.

6 THE COURT: Okay.

7 MR. SAMORE: We did not receive a response.

8 THE COURT: Okay.

9 MR. BRUCE: Yes, that was late last week, Judge, and  
10 I would like to address that at the appropriate time.

11 THE COURT: And that's something, the attorney-client  
12 issue, I have got a big ol' star next to it, and it says it  
13 needs to be fleshed out.

14 So I will make this attempt to see what's really at  
15 issue. So let me go to -- this is Plaintiffs' motion to  
16 compel. Plaintiffs' Fourth Set of Interrogatories, No. 2, it  
17 says, "Identify the names and address of all third-party  
18 individuals and/or companies that Cynosure" -- am I  
19 pronouncing that right, Cynosure?

20 MR. SAMORE: I think it is Cynosure, but I'm glad --

21 THE COURT: We will go with Cynosure, then.

22 -- "Cynosure hired or retained which provided web  
23 advertisements or other advertisements for the PicoSure  
24 machine."

25 My read of the Defendant's response is that it

1 provided the information, so the issue is moot. Is that your  
2 position, that you have provided the information?

3 MR. SAMORE: Yes, your Honor.

4 THE COURT: Okay. Have you had a chance to look at  
5 the response to see if you received the information? Because  
6 I don't know what you got. I don't know --

7 MR. BRUCE: You are asking about Interrogatory No. 2?

8 THE COURT: Plaintiffs' Fourth Set of  
9 Interrogatories, Interrogatory No. 2, correct. Defendant says  
10 they gave you the information.

11 MR. BRUCE: I'm sorry, the response that I'm looking  
12 at, they didn't give us an answer to that, so maybe there is a  
13 miscommunication.

14 THE COURT: Okay. Do you see --

15 MR. BRUCE: You see, that's why I did it this way,  
16 and maybe we made a mistake. I tried to kind of make it  
17 easier for you, Judge, and for me, like in this context, to  
18 have what I asked for and their response.

19 THE COURT: Right. And there has been lots of  
20 follow-up after that, so I want to make sure we are all on the  
21 same page.

22 MR. BRUCE: Yes. To be clear -- okay, fair enough.  
23 I mean, maybe I missed something, but out of all this stuff  
24 that went back and forth, they only changed their mind on  
25 about two out of 20-something.

1 THE COURT: Okay.

2 MR. BRUCE: So unless I missed, if this is one of  
3 them.

4 THE COURT: Okay. So let's go -- what did you  
5 provide in response to Interrogatory No. 2?

6 MS. LONG: This is one of the two. So we sent them  
7 an amended interrogatory answer on the Thursday before these  
8 motions were due, and we attached it to our response as  
9 Exhibit B.

10 MR. BRUCE: All right. Let me look at that, Judge.  
11 As I said, I'm frequently wrong. I will stand corrected.

12 I have their amended response.

13 THE COURT: Yes, docket entry 99-2.

14 No, that's the affidavit, sorry. So why don't you --

15 MR. BRUCE: They told -- I'm sorry, I didn't mean to  
16 interrupt.

17 THE COURT: Go ahead.

18 MR. BRUCE: I'm just trying to skim through. They  
19 have identified Doc Web, and as long as they are -- and that's  
20 an entity we already know about, and we served them with a  
21 subpoena. If that's -- you know, without all of the  
22 thaumaturgic language, if they are representing formally, as  
23 officers of the court, that's the only company, then the  
24 answer is, fine, we're done.

25 THE COURT: Okay.

1 MR. BRUCE: Are they representing that?

2 THE COURT: Okay.

3 MR. SAMORE: To our knowledge, that's correct.

4 THE COURT: Okay. I'm going to come back to that.

5 All right. Plaintiffs' Fourth Set of Production,  
6 that's a statement of any kind by named plaintiff or named  
7 plaintiff representative which is not encompassed in the  
8 previous request, that was my point under Rule 26. If you've  
9 got statements of the Plaintiffs --

10 MR. SAMORE: Just so long as it is clear, we  
11 haven't -- the information they are asking is on the web and  
12 within their possession and control. What we would -- we will  
13 produce whatever we have, but we are not representing that we  
14 have, and I don't think we have, any obligation, as your Honor  
15 would acknowledge, to scour the Internet for all the  
16 statements that they have made in the past.

17 THE COURT: If you don't have it, you don't possess  
18 them, right?

19 MR. SAMORE: Yes. We will produce what we have.

20 THE COURT: Good deal. But if you have got  
21 statements from the Plaintiffs, you have to provide them.

22 MR. SAMORE: We will produce them, yes, Judge.

23 MR. BRUCE: And just so you know, the concern that we  
24 have is, before we embark on the Plaintiffs' depositions, in  
25 every case, from the simplest auto to the most complex cases,



1 I give them, their statements, to defendants that I have and  
2 vice versa.

3 I don't want a circumstance, Judge, and what I'm  
4 trying to flesh out is they have been making a lot of  
5 objections up until this moment, when they changed their  
6 position right now. They have been saying, "We will get back  
7 to you. We will amend. We will respond." We have been at  
8 this for nine or twelve months. I don't want my clients being  
9 shown right at the deposition, when I'm down in Texas, a  
10 document I have never seen before that purports to be from my  
11 client. That's not fair, and that's what I'm trying to avoid.

12 And he is now saying, "We are going to give you  
13 everything we have got," and that's fine. Because if it comes  
14 up later, we are going to be here on a motion immediately. We  
15 have had plenty of time for them to get it. I think they have  
16 been -- I would like it.

17 MR. SAMORE: We have no obligation to search for  
18 their statements that --

19 THE COURT: If it is not in your possession, custody,  
20 and control, it is not in your possession, custody, and  
21 control. But if you have got them --

22 MR. SAMORE: We will produce them. Yes, your Honor,  
23 I agree.

24 THE COURT: All right. We will come back to that  
25 one.

1           Plaintiffs' Fifth Set of Request to Produce, all  
2   communications, form letters -- this is the Fifth Set of  
3   Request to Produce, No. 2, "All communications, form letters,  
4   e-mails, and correspondence with any punitive" -- I'm sorry,  
5   "putative" -- "putative class member which in any way concerns  
6   this litigation."

7           Defendant said produced the requested communications,  
8   right?

9           MR. SAMORE:   Concerning produced?

10          THE COURT:   I'm reading the question.  I'm telling  
11   you what my understanding of the response is.

12          MR. SAMORE:   Yes, the litigation --

13          MS. LONG:    Yes, we have a limited number of e-mails  
14   between defense counsel and the putative class member who  
15   wrote the declaration, that we attached to one of our other  
16   motions, and we can produce that.

17          THE COURT:   All right.  You can produce it or you did  
18   produce it?

19          MR. SAMORE:   We will produce it.

20          MS. LONG:    We will produce it.

21          THE COURT:   Okay.  So, obviously, the next follow-up  
22   question is when will you produce it?

23          MR. SAMORE:   We can do that, I think, within seven  
24   days.

25          THE COURT:   Okay.

1 MS. LONG: Yes.

2 MR. BRUCE: Judge --

3 THE COURT: Hold on a second.

4 MR. BRUCE: Okay.

5 THE COURT: All right. Go ahead, Mr. Bruce.

6 MR. BRUCE: They indicate, after a number of the  
7 boilerplate objections, they will amend and supplement. I  
8 just want to understand, with the exception of the person that  
9 they are now using in their reply brief or whatever it is,  
10 their motion regarding whatever it is, motion to reconsider,  
11 with the exception of that person, I think what they are  
12 representing formally, as officers of the court, is they don't  
13 have any other communications with any other putative class  
14 member regarding communication, because I don't want to  
15 just -- the one that they are using as an affiant, I want any  
16 of those correspondence or communications.

17 THE COURT: The request says, "All communications,  
18 form letters, e-mails, and correspondence with any putative  
19 class member which in any way concerns this litigation,"  
20 right?

21 And you are telling me those will be produced by  
22 April 18th, right?

23 MR. SAMORE: Yes, your Honor.

24 THE COURT: All right. So that seems like it has  
25 been resolved.

1           Okay. Now we kind of hit a vein here. Let's go to  
2   Plaintiffs' Fifth Request to Produce, No. 3.

3           All right. This is what drives everybody crazy in  
4   pretrial litigation. So there is an objection, lots of  
5   objections, including burdensomeness. But after we sift  
6   through all of that, it is the Defendant's response that you  
7   are not withholding any documents.

8           So are there any documents that would be responsive  
9   to the Fifth Set of Request to Produce, No. 3, that are being  
10   withheld?

11           MR. SAMORE: What does that concern? Okay, yes.

12           We have conducted a reasonable search. We are not  
13   withholding any documents that we found responsive to this  
14   request.

15           THE COURT: Okay. So that's where -- we are all  
16   attorneys, so we are naturally suspicious. So when you get a  
17   whole list of objections, including burdensomeness, and at the  
18   very end, you say, "And there aren't any," it is hard for  
19   something to be burdensome if they don't exist, because you  
20   don't have to produce them, right?

21           MR. SAMORE: Well, it is possible our answers could  
22   have been more succinct.

23           THE COURT: Okay. All right. I'm just telling you  
24   what I have found, okay?

25           MR. SAMORE: Right. Okay.

1           THE COURT: All right. So that appears to be  
2 resolved because they said they are not withholding anything,  
3 all right? Now, if they say they don't have them, they don't  
4 have them. And if they pop up later, that's a whole other  
5 issue. And my crystal ball is at the shop, so I don't know  
6 what's going to be happen in the future.

7           MR. BRUCE: I don't know either, Judge, and it is  
8 always -- you know, I'm always kind of even glass. So I have  
9 got the single plaintiff, and I'm always against these  
10 corporate entities, and I just -- for the record, I don't know  
11 how you have this company that is marketing this machine, and  
12 they market it worldwide, and then they come in with an  
13 upgrade and additional software, and they have all these  
14 marketing people and all that, and they are saying, as a  
15 matter of course, "There is no e-mails, there is no documents,  
16 there is nothing at Cynosure which is in any way how we  
17 upgrade this or how we market it, how we are doing the  
18 software." I mean, I find that very difficult to believe.  
19 But, again, Judge, I can't say they are wrong. I don't know.

20           THE COURT: Okay.

21           MR. BRUCE: I mean, as you said, Judge, I was going a  
22 different direction. They had all these boilerplate  
23 objections. If they didn't have any, it would have been easy  
24 just to say "none."

25           THE COURT: Okay.

1 MS. LONG: As further explanation, which might help  
2 elucidate, my client -- you know, the way that I understand  
3 from the client is that the PicoSure machine never needed an  
4 upgrade. Upgrades were provided, but the machine would work  
5 fine on its own. As to why additional software was needed,  
6 they weren't really sure what that meant. We don't know what  
7 "et cetera" means in the context of this. So I'm not sure if  
8 there are documents that may be responsive to what Plaintiffs'  
9 counsel thought they were looking for, but we don't have any  
10 responsive to the request as it was written.

11 MR. GRAVINO: Judge, it sounds like they are saying  
12 that they interpreted this as only to ask for documents as to  
13 why this upgrade was needed, but if it was recommended or  
14 advisable or something that they were selling, they are saying  
15 that's not really within the scope of this. And my  
16 recollection, we had a Rule 37 conference about that. I think  
17 our intention was clear in saying if you marketed this upgrade  
18 and said that, you know, you can buy this and it will improve  
19 the performance of the machine, that's what we were looking  
20 for. Certainly, I think we could agree to narrow that as  
21 well.

22 Devon, I don't know your position on that.

23 THE COURT: Well, if you narrow it, you are not going  
24 to get any more because they are saying --

25 MR. GRAVINO: Not narrow. I misspoke, Judge. Not

1 narrow, but change the word "needed" to how to respond and/or  
2 market as to why the PicoSure machine might benefit from or be  
3 enhanced by an upgrade or whatever.

4 But we were not intending to suggest that -- you  
5 know, seek an admission from them that it utterly didn't  
6 function at all unless you bought this. I think that was  
7 clear in our Rule 37 conference.

8 But, Devon, I think we can --

9 MR. BRUCE: I mean, however they want to handle it.  
10 Judge, I know for a fact, at least the named plaintiffs that  
11 are currently before you, they tried to sell them this  
12 software and this upgrade when the machine didn't work as  
13 advertised. That's the fact, and that's going to come out in  
14 the deps. And then they, obviously, developed this software  
15 or these upgrades. It wasn't just for our clients.

16 So I find it difficult to believe that they didn't  
17 have any correspondence and e-mails about why they are doing  
18 that and address the concerns, but --

19 MR. GRAVINO: Judge, I think that it strikes me,  
20 given the response that counsel just clarified with, that they  
21 are kind of hiding behind the word "needed" and saying, "Well,  
22 it really didn't need an upgrade, so we don't have any  
23 documents responsive to that," and my suggestion is that we  
24 agree to amend that to say that if the unit --

25 THE COURT: Well, the problem is we can't really

1     amend it on the fly because then they have to go back --

2                 MR. GRAVINO: I understand. If that's --

3                 MR. BRUCE: We can send one out tomorrow that doesn't  
4     have the word "needed," and it is going to be the same thing.

5                 MR. GRAVINO: Hopefully, we won't be back here,  
6     because if you agree that it states a generally discoverable  
7     request, we will amend it, and hopefully we can get better  
8     compliance with that.

9                 THE COURT: Okay. In the -- I assume there were  
10    instructions in the interrogatories the Plaintiffs sent out  
11    and the production request. Is there any kind of time frame  
12    scope, time frame that limited the scope of these?

13                MR. BRUCE: No, I would -- no, I would just say -- I  
14    mean, I'm narrowing -- I'm just focused on this one PicoSure  
15    machine. I mean, the workstation as defined in the complaint,  
16    that's what we are after.

17                MR. GRAVINO: And, Judge, they actually, in an  
18    earlier discovery request -- I apologize, I'm two weeks into a  
19    cold, at the tail end, and my voice is still coming back.

20                THE COURT: Keep your distance.

21                MR. GRAVINO: We requested documents relating to this  
22    machine, and they produced a list of approximately 350 to 400  
23    PicoSure purchasers. That really is the field, I think, we  
24    are working with here. So I think that defines the scope,  
25    at least at that point, which was about, maybe, 18 or 20



1 months into the litigation.

2 THE COURT: Okay.

3 MR. SAMORE: Your Honor, I just --

4 MR. GRAVINO: So if we got -- I apologize.

5 If we got the documents responsive to that group that  
6 they produced a list of, the 400 customers, I think that would  
7 certainly be a good start.

8 THE COURT: Okay. Go ahead.

9 MR. SAMORE: Just real briefly. Substantively --

10 MS. LONG: There are other requests to produce that  
11 cover a more broader topic. Like the request to produce 14,  
12 in their sixth set, it asks for documents regarding the use of  
13 a software update or add-on. I think another one, that I'm  
14 having a hard time finding right now, but I'm pretty sure,  
15 they asked for one about how to market the add-ons. So we  
16 have produced some documents responsive to their concern that  
17 they are expressing now in response to their discovery  
18 requests that were tailored, you know, that actually asked for  
19 that information.

20 MR. SAMORE: Regarding the upgrade, if they want the  
21 documents regarding an upgrade to the product, I believe  
22 that --

23 MS. LONG: They have been covered in at least one or  
24 two other.

25 MR. SAMORE: In a more direct correspondence.

1 THE COURT: All right.

2 MR. SAMORE: But the other thing I just want to say  
3 is that I was at the conference with Plaintiffs, and Devon was  
4 very clear. He did not want to talk about the requests. We  
5 certainly didn't -- there was no explanation of this request  
6 or any others. It was basically, "I think we have got this  
7 covered," as he said in the beginning. "I think we have got  
8 this covered." Can we agree that we complied with Rule 37.2?  
9 I, perhaps, mistakenly agreed to that, but there was certainly  
10 no discussion. I just want to make the record clear with  
11 respect to that, although it is an ancillary point.

12 THE COURT: Well, we are all here, so I am going to  
13 see what we can get accomplished today, okay?

14 MR. SAMORE: Okay.

15 THE COURT: All right. Let's go to Plaintiffs' Sixth  
16 Request For Production, No. 6: "Any and all documents,  
17 including internal memoranda, e-mail, and/or correspondence  
18 that involved the development, use, and/or distribution of any  
19 other advertisements utilized by Cynosure to market or  
20 advertise the PicoSure" -- I'm going to give you the  
21 spelling -- "produce where the tattoo was 'photoshopped' on to  
22 a model."

23 There is objections, but then subject to the  
24 objections, there is no documents. So if there is no  
25 documents, there is no documents, right? That's what you are

1     telling me?

2                 MS. LONG:   Actually, this is going to be an easy one.  
3     This is included in the -- we are going to produce additional  
4     documents.

5                 THE COURT:   All right.   And that would occur on  
6     April 18th as well?

7                 MR. SAMORE:   Well, your Honor, we may -- I don't know  
8     that we can do everything within a week --

9                 THE COURT:   Okay.

10                MR. SAMORE:   -- within that time frame.   They took  
11     eight months to promulgate their responses and took over a  
12     year to respond to our first set.   So we may need -- when we  
13     are all done, we can maybe --

14                THE COURT:   How much time do you need?

15                MR. SAMORE:   I'm going to say, what, three weeks,  
16     maybe, just to be on the safe side, and that would be true for  
17     the Plaintiffs as well in terms of their production.

18                THE COURT:   Is that going to allow people to take  
19     depositions in a timely manner?

20                MR. BRUCE:   No.   And, Judge, I can't -- I disagree  
21     with his assertions about the Rule 37 conference, and I just  
22     can't keep letting him make assertions on the record and  
23     impugning my character.   That is not true.   We gave them 4,000  
24     pages of Plaintiffs' medical patient records, and my  
25     recollection is that all was in November or December.   You

1 know, it hasn't been a year. It doesn't take me a year to  
2 respond to them, but it is anecdotal.

3 THE COURT: Okay. All right. We will talk about  
4 when the documents will be produced.

5 MR. SAMORE: Okay. Thank you.

6 THE COURT: So then let's -- and at the end of this,  
7 I'm going to need a certification from the Defendants that  
8 what has been produced is complete and that is it.

9 MR. SAMORE: What we would certify to is what we are  
10 required to, which is that we have made a reasonable  
11 investigation and that we have produced every document we  
12 found pursuant to that investigation.

13 THE COURT: Well, I will tell you what the --

14 MR. SAMORE: Okay.

15 THE COURT: I will tell you what the certification  
16 will be.

17 MR. SAMORE: Okay.

18 THE COURT: Can we continue with my process?

19 MR. SAMORE: Yes, your Honor, absolutely.

20 THE COURT: Okay. All right. So No. 9, again, we  
21 are talking about Plaintiffs' Sixth Request For Production of  
22 Documents. No. 9, "All communications of any kind (whether  
23 paper, electronic or otherwise) between Defendant and any  
24 other person or entity (including, but not limited to,  
25 internal communications), wherein Defendant discussed or

1 considered how they would create market demand for this  
2 product, taking into account any considerations, including,  
3 but not limited to, the selling price of the PicoSure product  
4 compared with the selling price of the Revlite product or any  
5 other machine that is sold by any company to lighten or  
6 purportedly 'remove' tattoos."

7 The Defendant says it is not withholding any  
8 responsive documents. Is that right?

9 MR. SAMORE: Yes, your Honor.

10 THE COURT: Okay. All right. So if you are not  
11 withholding anything, you are not withholding anything.

12 Now we are going to hit a vein because we go through  
13 a bunch where this is all said. Again, we are staying on the  
14 Plaintiffs' Sixth Request For Production of Documents, and  
15 No. 10 has a request and a long objection, and then the  
16 Defendant says it is not withholding any responsive documents.

17 So no responsive documents are being withheld for  
18 No. 10? Everything has been produced?

19 MR. SAMORE: We have conducted a reasonable  
20 investigation, and we have produced -- we have spent hours  
21 trying to comply with these requests, and we are not  
22 withholding any that we found were responsive, yes, your  
23 Honor.

24 THE COURT: Okay. The same for No. 11, the same for  
25 No. 12, the same for No. 13, the same for No. 14, the same for

1 No. 15. They all have an objection and then says nothing is  
2 being withheld. So it is the same representation, correct?

3 MR. SAMORE: Yes, your Honor, as I just stated. Yes.

4 THE COURT: All right. So let's go to 16.

5 MR. BRUCE: Judge, can I just -- I'm sorry.

6 THE COURT: Go ahead.

7 MR. BRUCE: Just as an example, so Cynosure is  
8 telling me and you under oath that they have given us every  
9 e-mail that they had with respect --

10 THE COURT: Which number are you on?

11 MR. BRUCE: I'm still at 10 because I'm still --

12 THE COURT: Okay.

13 MR. BRUCE: -- shell shocked.

14 THE COURT: Okay.

15 MR. BRUCE: They have given us, according to what I  
16 just heard, every e-mail regarding any marketing materials by  
17 Cynosure to any purchase of their PicoSure machine? So let's  
18 just pause and think about this. They had 350 purchasers, let  
19 alone ones that looked at it and didn't buy. So 350 people  
20 bought this machine.

21 THE COURT: Let me pause you right there, Mr. Bruce.

22 MR. BRUCE: Sure.

23 THE COURT: Because he hasn't really said that. He  
24 said it three times, and I'm going to hold him to it, that the  
25 Defendant has made a reasonable investigation.

1           Now, if there is an e-mail server where somebody has  
2   got a bunch of e-mails, and it comes up in a deposition that  
3   there were e-mails about this issue and all they needed to do  
4   was hit print and provide it, well, that doesn't sound like a  
5   reasonable investigation. But I don't have that before me,  
6   right? So I think he gets my point.

7           MR. BRUCE: I don't know that he does, Judge, that's  
8   the point. I don't know that he does because there -- I mean,  
9   there are e-mails that he hasn't given. There has got to be  
10  e-mails where they said to the guy, a hypothetical, in  
11  Maryland who bought the machine, "Here is the girl with the  
12  tattoo, and here is how this thing is going to work out."  
13  There has to be e-mails, and not only do they have -- I mean,  
14  we got a reply brief after a year of this, pinning on them.

15           In the reply brief, I get sandbagged with some guy  
16  named James Palastra, who absolutely has no foundation. He  
17  doesn't say he did any search for any discovery. He didn't  
18  say he did any e-mail search. He doesn't tell us who did the  
19  e-mail searches. He doesn't tell how the e-mails were  
20  searched. I mean, this is preposterous, and now he is saying,  
21  "Oh, yes, we gave it all."

22           THE COURT: Well --

23           MR. BRUCE: I mean, I'm hogtied here, Judge, because  
24  I don't know -- I can't tell you what I don't have because I  
25  haven't seen it, but I am quite -- I mean, what do I do, fly

1 out to New Jersey?

2 Judge, I'm going to have to then go out to New Jersey  
3 or wherever these people are, two or three times, and every  
4 time I have to prove up that they don't have -- they give me  
5 e-mails, and I have got to fly back out there again. I mean,  
6 really, it would be a lot easier if they went and did a search  
7 and gave me the e-mail.

8 I'm sorry, Judge.

9 THE COURT: Well, in my notes, it says "reasonable  
10 investigation???", which is my note to myself saying we are  
11 going to talk about what the reasonable investigation was.  
12 And to your point, if that's what happens, there are  
13 consequences to that and there are remedies for that. If  
14 that's what turns up, that there are e-mails that are right on  
15 point, that are in a request, and that it was said that they  
16 were produced after reasonable investigation, if it turns out  
17 that's not true, I don't know what your billing rate is, but  
18 I'm pretty sure it is not --

19 MR. BRUCE: It is high. It is high. And just for  
20 the record, instead of going down that rabbit hole, I would  
21 much rather have the stuff so I take the dep for the first  
22 time in a competent and --

23 THE COURT: I'm not disagreeing with you, but I can  
24 only deal with what I have in front of me.

25 MR. BRUCE: My billing rate is high, Judge.



1 THE COURT: Go ahead, Mr. Samore.

2 MR. SAMORE: We will address -- one of the topics is  
3 e-mails communications, and we can address that with you in  
4 some detail, too, if you would like now. So we will get -- I  
5 think that --

6 THE COURT: As much as you're trying to be diverted  
7 from my path, no one is going to change me, all right? I am  
8 one stubborn individual. So we are going to keep going  
9 through this process, and I'm going to see what has been  
10 resolved.

11 MR. SAMORE: Okay. I will --

12 THE COURT: We will come back to that.

13 MR. SAMORE: I would like to comment on the  
14 burdensomeness of the investigation because --

15 THE COURT: We are going to talk about that.

16 MR. SAMORE: We have spent thousands of hours.

17 THE COURT: We are going to talk about that.

18 MR. SAMORE: Okay.

19 THE COURT: But my point, again -- I can't make this  
20 any clearer -- is you are telling me that everything on these  
21 requests that I have identified, everything that was found  
22 pursuant to this reasonable investigation, has been produced.  
23 So I'm going through that checklist so that we have that  
24 confirmed, okay?

25 MR. SAMORE: And, your Honor, I will address the

1 burdensomeness of an e-mail investigation.

2 THE COURT: Again, we will address burdensomeness  
3 when I get through this process. So as much as everyone wants  
4 to divert me, we are going to do it, okay?

5 MR. SAMORE: Okay. Thank you.

6 THE COURT: Okay. No. 17, "Any and all documents,  
7 including any e-mails or communications, that Cynosure has had  
8 with any putative class member regarding their satisfaction or  
9 opinion about the PicoSure machine." All right. Right? This  
10 is one where it says documents have been produced in the  
11 complaint log, but anything else would be burdensome.

12 So is it the Defendant's position that if it is not  
13 in the complaint log, it is not going to produce them?

14 MR. SAMORE: Well, this is the Defendant's position.

15 THE COURT: Okay.

16 MR. SAMORE: Okay. Your Honor, there were about 450  
17 PicoSures that were sold. We have 150 --

18 THE COURT: 450.

19 MR. SAMORE: 450.

20 THE COURT: Okay.

21 MR. SAMORE: Because that 300 number that was  
22 mentioned was an earlier time frame.

23 THE COURT: Okay.

24 MR. SAMORE: And there is 450. We have 150 to 200  
25 people on our sales staff. We have departments in the service

1 department. We have got compliance. We have regulatory. We  
2 have administration. We have trainers, and so forth, and as  
3 well as legal.

4 In order to search all of those e-mails, that would  
5 be -- it would just be very burdensome, and I would request  
6 leave to supplement with an affidavit. We just got their  
7 motion a week and a half ago. We had a week and a half to  
8 respond to a 35-page motion with -- that addressed 34, and I  
9 would simply ask for leave to supplement.

10 THE COURT: When you say "34," what are you talking  
11 about?

12 MR. SAMORE: What's that?

13 THE COURT: You said "34." What are you talking  
14 about?

15 MR. SAMORE: 34 different requests that were the  
16 subject of their motion.

17 THE COURT: Okay.

18 MR. SAMORE: And we moved as quickly as we possibly  
19 could. The woman who was primarily responsible for this was  
20 on maternity leave the day after, essentially, we had our 37.2  
21 conference, and I would simply ask leave to supplement.

22 But this product has been highly rated by customers  
23 throughout the website. This is the only lawsuit that has  
24 been filed against this product. In order to do this search,  
25 it is going to take -- to search all the e-mails, it will be

1 thousands of hours, even before we get to certification. It  
2 is not relevant. It is not important.

3 THE COURT: Well, it is relevant. So you can throw  
4 that argument aside because it is surely relevant. I made  
5 that decision multiple times.

6 MR. SAMORE: Okay. That's fine.

7 THE COURT: Three things for discovery. Is it  
8 privileged? This is not privileged. Is it relevant? This,  
9 yes. Is it proportional? That's No. 3.

10 MR. SAMORE: Right.

11 THE COURT: Those two, the first two don't apply. We  
12 are talking about the third.

13 MR. SAMORE: Yes.

14 THE COURT: We are going to talk about that.

15 MR. BRUCE: I had some -- I didn't mean to interrupt.  
16 Go ahead.

17 MR. SAMORE: Okay. And in addition, I mean, for  
18 example, just to show you, the Plaintiffs haven't produced,  
19 that we could find, any written communications of any  
20 complaints about the effectiveness of this product before they  
21 filed a lawsuit. There is an independent website that this  
22 product is one of the most highly rated products in the  
23 industry that's put out by the various customer views. There  
24 is just no -- I mean --

25 THE COURT: And that may be all true, and that will

1 be great evidence to present to seven people we put in the  
2 jury box, but their point is not true.

3 MR. SAMORE: Okay.

4 THE COURT: And if there is complaints, they are  
5 entitled to get them.

6 MR. SAMORE: The complaints, we have a  
7 regulatory -- that's -- that we are on very firm ground  
8 because we have -- we are heavily regulated by the FDA. We  
9 have policies and procedures in place that train people to  
10 report all complaints, and we produced them all. There just  
11 have been very few, and we are required --

12 THE COURT: Let's circle back around to my question.

13 MR. SAMORE: Yes.

14 THE COURT: Which was -- and it is a yes or no -- is  
15 it Defendant's position that it has produced this complaint  
16 log and won't produce anything else?

17 MR. SAMORE: It is our position that to conduct an  
18 e-mail search of 450 separate purchasers, finding their names,  
19 the one to five different salespeople that could have dealt  
20 with them, along with the service people that would have  
21 serviced the unit, the people that would have trained them,  
22 that is unduly burdensome.

23 THE COURT: Okay.

24 MR. SAMORE: Or not -- strike that -- or not  
25 proportional to the needs of the case at this point in time.

1 THE COURT: Okay.

2 MR. BRUCE: I'm dying to comment on this, whenever he  
3 is finished and you will allow me.

4 THE COURT: I just need to write the word "yes."  
5 Go ahead.

6 MR. BRUCE: Judge, I think what I just heard from  
7 Mr. Samore is, at one level, some of these issues are pretty  
8 straightforward and basic. I'm saying that the machine  
9 doesn't work as they had the women with the tattoos. That is  
10 misleading, those ladies. I'm saying it doesn't do that. And  
11 contrary to what he says, I think when this fleshes out, there  
12 is going to be a lot of evidence, I think, of this machine not  
13 doing what they put in that picture, okay?

14 So in any product liability case or case of this  
15 manner, I am just asking for complaints. And before you say  
16 it or he says it, I'm readily embracing the fact that some of  
17 these interrogatories, requests to produce, they overlap,  
18 right? I'm trying to get them to give me the complaints where  
19 people were not satisfied and said, "This thing doesn't work.  
20 It doesn't do what you told us." And I'm trying to get that.  
21 Where I get that, it is basic form of law.

22 I think I just heard Mr. Samore shockingly say,  
23 implicitly, although not expressly, is "We haven't looked."  
24 That's what I heard him say. I think he just said, "We  
25 haven't looked." What he said is "Judge, give us some more

1 time, after we have wasted six or nine months," and now you  
2 are going to be on me about "Mr. Bruce, you have got to get  
3 these deps done." Your Honor, I'm just saying we have wasted  
4 six or nine months. Whenever all this stuff was filed, he sat  
5 in the background and had not gone out and done any type of  
6 e-mail search for this stuff. They want to give me some  
7 little paper log that says, "This is what we keep and this is  
8 the complaints."

9 I'm asking for stuff far broader than that. I'm  
10 asking for people that are dissatisfied. I want the e-mail  
11 correspondence between the people who bought this thing and  
12 their company. That's what I want. And it is not  
13 complicated. And I don't want to play a semantics game, like,  
14 "Well, you used the word 'needed.'" I don't -- that's  
15 not -- I mean, it is clear what I'm looking for. And I think  
16 I just heard Mr. Samore say implicitly, not expressly, they  
17 haven't done anything.

18 So now he is saying at the eleventh hour, after we  
19 have gone and done all these Rule 37 conferences and they have  
20 completely stonewalled, they have not answered 80 percent of  
21 my discovery I have sent to them, now he is saying, "Give us  
22 more time to get together an affidavit," for somebody that is  
23 going to show that e-mail is too difficult. Judge, they  
24 should have done that before. He is making oral  
25 representations to you with no basis at all.

1           My understanding of the federal case law is very  
2 clear. He has got to come with an affidavit, and it is not in  
3 the reply brief from somebody that said -- there was no  
4 attestation by this guy Palastra --

5           THE COURT: Hold on one sec.

6           Have you caught up, Heather?

7           THE REPORTER: Yes.

8           THE COURT: Okay.

9           MR. BRUCE: There was no attestation from this guy  
10 Palastra what role he played in the discovery, whether he ever  
11 looked at an e-mail, who looked at an e-mail, what searches  
12 they had, nothing.

13           So now at the eleventh hour, he throws this one-page  
14 thing at you and says, "Well, here is the proof." Now he is  
15 saying, "I want more time. I want more time to go and do  
16 this." This is ridiculous. I would object to him  
17 having -- you know, to get some paid person from Cynosure to  
18 come and say, "Oh, it is all burdensome." He has had six  
19 months to do it. I object to that. I object to that.

20           I want somebody to go and give me the e-mails from  
21 these people so we can see what they truly thought about this,  
22 and, you know, he is trying to take you in a different  
23 direction. "Well, people are very satisfied with this."  
24 Well, I would like to test that.

25           THE COURT: I said you would have the opportunity to



1 test that.

2 MR. BRUCE: Thank you.

3 THE COURT: You can make that pitch to the seven  
4 people in the jury box, and we will have that information, and  
5 as I said, it is relevant. It is the issue of  
6 proportionality.

7 MS. LONG: Judge --

8 THE COURT: Nope, nope, nope, nope, nope, nope, nope.  
9 Done.

10 No. 19 --

11 MR. SAMORE: Your Honor --

12 THE COURT: No.

13 No. 19 --

14 MR. SAMORE: Your Honor, we did an e-mail -- he made  
15 a false representation.

16 THE COURT: We are going to come back to that.

17 MR. SAMORE: We did an e-mail --

18 THE COURT: Do you understand the word "no"?

19 MR. SAMORE: I do.

20 THE COURT: Okay. Then listen to me.

21 No. 19, "Any and all market surveys, studies,  
22 internal e-mails, and/or correspondence regarding the value of  
23 used or aftermarket PicoSure machines."

24 Defendant's contend they are not withholding any  
25 responsive documents. Again, true?

1           MR. SAMORE: We have -- yes, it is the same response.  
2 We have conducted a reasonable investigation. We have  
3 produced everything we have found.

4           THE COURT: No. 20, "Any and all market surveys,  
5 studies, price lists, and/or internal e-mails regarding the  
6 cost of any alternative tattoo 'removal' or tattoo lightening  
7 machines on the market."

8           Again, the Defendant is representing to the court  
9 that they are not withholding any responsive documents after  
10 this reasonable investigation, correct?

11          MS. LONG: Yes.

12          THE COURT: Okay. The same for 22, 23, 24, right?

13          MR. HOLEVAS: Your Honor, can I have those numbers  
14 again? I'm sorry.

15          MS. LONG: Yes.

16          THE COURT: 22, 23, 24.

17          MR. HOLEVAS: Thank you.

18          THE COURT: All right. So their representation is  
19 that they have conducted a reasonable investigation and they  
20 are not withholding any documents, correct?

21          MS. LONG: Yes.

22          THE COURT: Okay. So, hopefully, that made some  
23 headway.

24                I think I stated early on, if it is disproportional  
25 or someone is saying burdensome, I need facts, and I just

1 don't have facts. I have got conclusions, but not facts.

2 But let's go to Plaintiffs' Six Request For  
3 Production, No. 4: "Any and all contracts, letters,  
4 communications, e-mails, and/or correspondence with any  
5 modeling agency, model, and/or third party regarding the  
6 advertisements utilized by Cynosure to market or advertise  
7 where in which any tattoo was 'photoshopped' on to a model.

8 "Objection, burdensome and relevance."

9 I don't know how it is possibly not relevant. How is  
10 it not relevant? Their whole claim from day one is they are  
11 showing pictures with models with a butterfly in one picture  
12 and no butterfly in another picture, and they are saying it is  
13 false advertising. How would that not be relevant?

14 MS. LONG: Your Honor, our relevance argument was  
15 based on the idea that there was an actual modeling company  
16 and saying, "Hey, can we have a model come on Monday from 1:00  
17 to 5:00." It is not substantive enough to be relevant, but  
18 this is included in the requests that we will supplement. We  
19 will give them those e-mails.

20 THE COURT: Okay.

21 MS. LONG: I don't know that they are going to have  
22 what they think they are going to have in them, but --

23 THE COURT: It is not just e-mails. It is letters,  
24 communications, e-mails, and correspondence, okay? So you  
25 will produce those as well?

1 MS. LONG: We will conduct a reasonable search for  
2 those and produce.

3 THE COURT: Well, what kind of time frame is that?  
4 Because, again, it seems pretty relevant.

5 MR. SAMORE: Yes. Well, I think that we should have  
6 three weeks. I think the three-week time frame would be fine.  
7 They had our first set of production requests since January.  
8 We didn't get responses until December. We have not -- my  
9 point is that we have not been the cause of any delay in the  
10 written discovery. We served one set. They waited almost a  
11 year to comply. And three weeks is a reasonable period of  
12 time to request.

13 THE COURT: Okay. Well, how long it takes for your  
14 client to get the documents together has nothing to do with  
15 what they did or did not do in response to your request,  
16 right? It is a non sequitur. It is a debater's point is what  
17 it is, right? You are both going to point the finger and say,  
18 "You guys are going to delay. You guys are going to delay."  
19 To me, it doesn't matter. I don't care what he did. I care  
20 how fast you can get these clearly relevant documents to the  
21 Plaintiffs. So we will talk about that three-week time frame,  
22 okay?

23 Shouldn't that be -- do we need discovery on that?  
24 Isn't that a stipulation? I mean, didn't --

25 MS. LONG: Yes. I mean, that was the other relevant

1 thought, was that we are not arguing that we didn't do these.  
2 We are not arguing this wasn't photoshopped. We told them it  
3 was photoshopped.

4 THE COURT: Well, did you tell them you would  
5 stipulate to it?

6 Did you tell them you would stipulate to it?

7 MR. SAMORE: We stipulated to it. We admitted it in  
8 our responses, which is what got, you know, this position we  
9 are in.

10 MR. BRUCE: That's not true, Judge. They answered  
11 one thing on one photograph, and then that's what they said  
12 was photoshopped.

13 But I want to answer the question, because you bring  
14 up a good question, Judge. If you look at Request to Produce  
15 No. 4, it says, "Any and all contracts, letters,  
16 communications, e-mails with any modeling agency, model, or a  
17 third party regarding the advertisements used by Cynosure to  
18 market or advertise where in any tattoo was photoshopped on to  
19 a model."

20 So, Judge, I can think of a myriad of examples, and  
21 just tell me when you have had enough, why this might be  
22 highly relevant.

23 THE COURT: I think it is relevant.

24 MR. BRUCE: Oh, okay.

25 THE COURT: I don't need to be convinced of that. I

1 have been saying it is relevant.

2 MR. BRUCE: Okay.

3 THE COURT: Okay. Talked about. Talked about.

4 Talked about. Talked about.

5 Okay. I'm going to need some help on this one.

6 Plaintiffs' Sixth Request For Production, No. 18, I don't

7 understand the request and I don't understand the response, so

8 I can't rule on it with any certainty.

9 No. 18 is "Any and all video clips, digital or  
10 electronic downloads, and/or paper copies of any of the named  
11 plaintiffs to the instant lawsuit, including websites,  
12 brochures or advertisements, but not limited to all  
13 marketing/advertisement of products of the PicoSure product by  
14 the named plaintiffs."

15 So, Mr. Bruce, what are you looking for?

16 MR. BRUCE: Yes, so it is very -- it is very simple.  
17 Mr. Samore's response seemingly -- or one of his responses to  
18 this is "Your dermatology practices, your tattoo removal  
19 practices made certain advertisements on the Internet for  
20 their services." Okay. They made certain representations for  
21 their services, and he wants to use that, notwithstanding the  
22 fact that we got them from their client, right? That's a  
23 little fact he is going to have to get over with those seven  
24 people over there. But they have their own advertisements out  
25 there and brochures.

1 THE COURT: Who is "they"?

2 MR. BRUCE: My clients, the dermatology practices and  
3 the tattoo removal practices.

4 THE COURT: Okay.

5 MR. BRUCE: So I'm asking for video clips, downloads  
6 of the -- that's why I said "of the named plaintiffs to the  
7 instant lawsuit."

8 So he is saying, "Oh, Devon, your people advertised  
9 this. Your people advertised." Okay. "Well, give me what  
10 you got." I know he has downloaded them. Just give them to  
11 me. He is going to use them at the depositions. He is going to want  
12 to use them at trial. And if he doesn't want to give them to  
13 me, that's fine. We will just preclude him -- I will have a  
14 motion, which I think will be well brought, now or at the  
15 trial. If he doesn't have them, that's fine, we are not going  
16 to get into it. But if that's his defense, and he is telling  
17 me that -- he is suggesting that he has them, I would like  
18 them.

19 MR. GRAVINO: Judge, if I could add one thing very  
20 briefly. I think the other reason we asked for this, when  
21 Devon and I talked, is there are websites that go up and then  
22 they come down, and there are these web crawlers that go, and  
23 they will take a picture of the website, and they archive this  
24 stuff. I have been through this in commercial cases. So I  
25 will ask my client, "Can I see your website?" And they will

1 say, "Well, here it is now, but I can't tell what it was a  
2 year ago." They are evolving. We don't know if they have  
3 archived historical websites and things of that nature.  
4 That's why the simple answer might be "Well, go print your own  
5 client's websites off there. You know what they are." It is  
6 these historical ones, clips that may have been posted and are  
7 no longer available. We want to make sure we are not  
8 sandbagged when they sit down to take depositions, that  
9 everything they have, we have in advance.

10 MS. LONG: I mean, we don't have --

11 THE COURT: Hold on.

12 MS. LONG: Okay.

13 THE COURT: So what Mr. Bruce is saying, and your  
14 position -- I get your position, that makes perfect sense, is  
15 "Look, if you guys are whining and complaining about these  
16 machines, but meanwhile you are advertising them as they are  
17 the greatest things since cold beer, we want to see those  
18 statements," because they support your position that the  
19 machines are good. That makes sense.

20 What they are asking for, now that I have read it in  
21 that context, is, "Okay, do you have us making those  
22 statements, so we can -- you know, we can -- we are ready for  
23 brutal cross-examination."

24 MS. LONG: I'm not sure how they can be sandbagged by  
25 something that they themselves said.



1 THE COURT: All right.

2 MS. LONG: If they put it out there, they put it out  
3 there. So I'm not sure how they could claim that we would be  
4 hiding it from them. If they want me to go to their --

5 THE COURT: Is it privileged? No. Is it relevant?  
6 Yes. Is it disproportionate?

7 MS. LONG: Is it in our possession, custody, and  
8 control.

9 THE COURT: Well, that's an easy answer. Then it  
10 would just be "We don't have it." But that's not your answer  
11 to that question. But on all the other ones, you told me when  
12 you didn't. So when I see that, it raises questions.

13 MS. LONG: If they want us to go to their website and  
14 print it out and produce it to them, fine.

15 THE COURT: You don't have to produce it if it is not  
16 in your possession, custody, or control.

17 Do you have the type of documents or does your client  
18 have the type of documents that they have just identified?

19 MS. LONG: We have looked at their website. I think  
20 we have probably downloaded it. I can produce to them their  
21 downloaded website. But I think we want to make sure we are  
22 not precluded from using -- if we have not used any historical  
23 web crawlers to look back at previous things, and we do so, I  
24 don't see why we should be precluded from using it.

25 THE COURT: In the future?

1 MS. LONG: Yes.

2 THE COURT: Sure, as long as it is done before the  
3 supplementation date, which is in the case management order.  
4 So if you are going to do it, do it before the supplementation  
5 date, and then you are going to have to produce those. But if  
6 you don't have it, you don't have it. That's the simple  
7 answer.

8 Now, it sounds like you have downloaded some, so  
9 produce it.

10 MR. SAMORE: There was a newspaper article in which  
11 their clients said this was the greatest machine, and "It is  
12 fantastic. We love it."

13 THE COURT: Okay.

14 MR. SAMORE: And we will produce that. We are happy  
15 to produce that to them. We mentioned that at the last  
16 hearing, too.

17 THE COURT: Okay.

18 MR. GRAVINO: That was in the early stages, Judge,  
19 before the fog lifted.

20 MR. SAMORE: After they used it 200 times.

21 MR. BRUCE: It sounds like Mr. Samore wants to try  
22 this case.

23 THE COURT: We need more trials, and I don't mean  
24 that sarcastically. We need more trials.

25 Okay. So that takes care of 18. If you have got

1    them -- you don't have to go get them.  But if you have  
2    downloaded them, they are entitled to them, and you will  
3    produce those as well.

4                Response.  Okay.  No. 21, again, I do not understand  
5    the request or response.  So maybe we can make some headway  
6    like we did on the last one.

7                MR. BRUCE:  I'm sorry?

8                THE COURT:  21.

9                MR. BRUCE:  Their response or my request?

10              THE COURT:  Your request 21.  I didn't understand the  
11    request or the response.

12              So No. 21 says:  "Any and all contracts, agreements,  
13    correspondence, and/or e-mails between Cynosure and Doc Web  
14    Services regarding the creation of web advertisements for the  
15    sale or marketing of the PicoSure product."

16              So what are you looking at?  How is that relevant?

17              MR. BRUCE:  So, Judge, this didn't make any sense  
18    because you don't know who "Doc Web" is.

19              THE COURT:  I do not know, and I have questions about  
20    other people that were asked.

21              So who is Doc Web?

22              MR. BRUCE:  So Doc Web, apparently, what Cynosure  
23    did, and I can't tell you in all circumstances because they  
24    stonewalled, but at least as to one of my clients, if not  
25    more, they say -- Cynosure says, "Hey, you have got your

1 dermatology practice," which it would be that -- that's the  
2 only type of client, dermatology practice or a lightening  
3 tattoo parlor, okay? They say, "Hey, you buy this machine,  
4 and we will help you advertise, and, by the way, here are some  
5 examples to put up on your website," right?

6 THE COURT: Okay.

7 MR. BRUCE: It is just basically the  
8 misrepresentations they made to our clients, and then they  
9 say, "Okay, go ahead and make them to your people by putting  
10 them up on your website," but they also said, "Go to Doc Web  
11 Services."

12 THE COURT: Okay.

13 MR. BRUCE: That's a third-party company, and they  
14 said, "If you want to, you can hire them, and they know all  
15 about us, and we work with them, and they can help advertise  
16 the PicoSure machine services." That's what is Doc Web.

17 So it is a third-party company that Cynosure told the  
18 purchasers of the machine that they could utilize if they want  
19 to get help in advertising the services for the PicoSure  
20 machine, and the genesis of this request to produce No. 21 is  
21 to find out all of the e-mails and correspondence because,  
22 hypothetically, there may be communications between Cynosure  
23 and the third-party thing, these Doc Web people, where Doc Web  
24 people are saying, "Hey, we are helping advertise this stuff,  
25 but people are giving us feedback. It doesn't do what it is

1   supposed to do," this type of thing.   "What do you want us to  
2   represent for these purchasers of your machine?   What do you  
3   want us to push on these people in terms of how to advertise  
4   it?"   I don't know what is out there, but it is certainly not  
5   privileged.   And they haven't proven anybody that says it is  
6   burdensome.   And so that's why we want it.

7           THE COURT:   All right.

8           MR. GRAVINO:   It is one company, too, Judge.

9           THE COURT:   Go ahead, Mr. Samore -- or Ms. Long.

10          MS. LONG:   Yes, we can produce it.   We have got a  
11   limited number of e-mails where the company basically provides  
12   to Doc Web the name of purchasers who have purchased this.

13          THE COURT:   That Cynosure provides the documents?

14          MS. LONG:   Yes.   Cynosure basically sends Doc Web the  
15   name of the purchaser who has purchased this optional  
16   marketing package.   All substantive communications regarding  
17   that happened between Doc Web and the purchaser.

18          THE COURT:   So it almost is a broker kind of --

19          MS. LONG:   Yes, it is a very minimal.

20          THE COURT:   "These are the guys.   Go see them."

21          MS. LONG:   Yes.   It is a very middleman-type  
22   position.   We can produce those e-mails.

23                 I think one thing in particular here, I think we have  
24   gotten a fair number of invoices for them that would simply  
25   be -- there would be no contents about the efficacy of the

1 PicoSure machine, and it would basically be a request for  
2 finances.

3 THE COURT: You want to see invoices? There is no  
4 substance to that.

5 MR. BRUCE: Mr. Gravino?

6 MR. GRAVINO: It may go to bias, Judge. I don't  
7 know.

8 MS. LONG: There is thousands of them.

9 THE COURT: All right.

10 MS. LONG: We can give them a limited number of  
11 e-mails. Again, this is one of those things where I think  
12 that they are not going to be very excited about what they  
13 see, but we will give them what we have got.

14 MR. BRUCE: I was going to say at this point in time,  
15 Judge, to be lawyerly about it, I will just say we will  
16 narrowly, based on her -- I mean, this is the first time I'm  
17 hearing that. We will just agree on not to ask for the  
18 invoices at this time.

19 THE COURT: All right. So the communication, sort of  
20 that setup e-mail, things like that, those things can be  
21 produced, but no invoices.

22 See, they have invoices. All right.

23 Okay. No. 25, again, I don't know who the parties  
24 are here, so I don't know how it fits in. "All contracts,  
25 agreements, correspondence, and/or e-mails between any agent,

1 employee of Cynosure and Dr. Stephen" -- or  
2 Stephen -- "Mulholland, Sarah Brice, and Lori Mackey,"  
3 M-a-c-k-e-y. I have no idea who those people are, so I don't  
4 know how it is relevant. I need something more. So flesh  
5 this out for me.

6 MR. BRUCE: Sure. I believe, and I'm sure  
7 Mr. Samore will correct me if I'm mistaken, in terms of, A,  
8 and this -- and I just want you to know and Mr. Samore to know  
9 where my head is on this. They go around and they get these  
10 doctors to help espouse and talk about how great the PicoSure  
11 machine is. Upon information and belief -- I'm not  
12 representing this to the court -- upon information and belief,  
13 some or perhaps many of these doctors are well-compensated  
14 either through salary, stipends, expenses, et cetera, okay?

15 So to the extent that any of the studies he is going  
16 to start citing to you or any of the witnesses that he  
17 contemplates calling at trial are these doctors that they have  
18 and that they are paying in any way, shape, or form, he is  
19 going to see a similar request from me. If they are going to  
20 use them, that goes directly to bias. I get to know what  
21 Cynosure has paid these people, and if he is going to say, as  
22 an officer of the court, never been paid, no contracts, they  
23 just do it because they love the machine, that's fine.

24 THE COURT: Okay.

25 MR. BRUCE: So that's Mulholland. And then Sarah

1 Brice and Lori Mackey, again, these are a different kettle of  
2 fish. These people are in a different category. My  
3 understanding is that these people were key people in Cynosure  
4 that dealt with the PicoSure machine.

5 It is a matter of course, Judge, whether it is a  
6 medical malpractice case, a trucking case, or any of a litany  
7 of other -- I didn't want to rain on you with case law. I'm  
8 happy to do that. We always ask for the personnel file,  
9 especially for those people. If he wants to redact their  
10 medical records, appropriate redactions, I deal with that.  
11 You deal with that all the time. These are main corporate  
12 employees of the Defendant.

13 THE COURT: This isn't seeking personnel files. It  
14 is contracts, agreements, correspondence, and e-mails.

15 MR. BRUCE: Yes, okay, so poorly worded. Well, I  
16 certainly want all that, and then we can ask for the personnel  
17 file at a subsequent time. But certainly that's the genesis  
18 of this.

19 THE COURT: Okay.

20 MS. LONG: So --

21 THE COURT: Let's start with Mulholland,  
22 Dr. Mulholland, first.

23 MS. LONG: My understanding, and this is somewhat  
24 limited -- your Honor, I have only been on this case a month;  
25 I'm taking over for the woman who is on maternity leave, so



1   forgive me for a little bit of lack of knowledge here -- he is  
2   a consultant. He does go around and talk about PicoSure. He  
3   goes to conferences and things. I'm not sure that any e-mail  
4   that he has ever sent to the company, you know, would be  
5   relevant. I'm just not -- they don't make any allegations  
6   about him in their complaint. Are they going to ask this  
7   about everyone we have ever employed, who we have ever given  
8   any kind of stipend to attend any kind of conference? Where  
9   does it end?

10           MR. SAMORE: He is not listed as a witness of ours,  
11   and they haven't alleged that they attended any of his  
12   conferences. This appears to be a fishing expedition.

13           THE COURT: Okay.

14           MR. SAMORE: If we were retaining him -- if we had  
15   disclosed him as a witness to testify, he would be on firmer  
16   ground.

17           MR. BRUCE: Judge, I can --

18           MR. SAMORE: But there is no allegation that the  
19   Plaintiffs had anything to do with this individual.

20           THE COURT: Okay.

21           MR. BRUCE: Yes, I didn't mean to interrupt  
22   Mr. Samore.

23           First of all, the last time I checked, I don't need  
24   to allege something in my complaint with respect to a matter  
25   like this in order for it to be discoverable, let alone

1 relevant. This guy is their A-team poster child. He flies  
2 around the country, and he talks about how great this very  
3 machine is. That's what this guy does. And contrary  
4 to -- because we have never gotten to depositions, he would find out  
5 that some of my clients have gone to seminars in which he was  
6 in attendance, but I don't need to allege that, nor do I need  
7 to -- and even if that wasn't true, that doesn't restrict me  
8 from asking about this guy.

9           They want to use this guy as their poster child,  
10 Cynosure does, to go around and promote and sell this stuff.  
11 I think every e-mail between him and Cynosure is highly  
12 discoverable. We are not at relevance. It is highly  
13 discoverable because it is about him peddling this machine.

14           THE COURT: It doesn't say that. So if he sends an  
15 e-mail to the IT department and says, "I have the blue screen  
16 of death," that would be captured, but it is certainly not  
17 relevant to the case, right?

18           MR. BRUCE: Absolutely, Judge. We will narrow it. I  
19 will narrow the e-mail request, anything -- any and all  
20 references to the PicoSure machine. That's fine. And same  
21 with correspondence.

22           THE COURT: Produce any contracts or agreements with  
23 Dr. Stephen Mulholland. I can see how that is relevant.

24           MS. LONG: We could produce the contract, I think.

25           MR. SAMORE: Yes.

1           THE COURT: The contract, agreement, whatever you  
2 want to call it.

3           MR. SAMORE: Thank you.

4           MS. LONG: Master document.

5           THE COURT: Okay. Correspondence and e-mails,  
6 especially if it is somebody who is not -- if it is not on  
7 their 26(a)(1), which means they are not testifying, I think  
8 that is overbroad at this point. But if something comes up in  
9 a deposition, I can revisit it.

10           Sarah Brice and Lori Mackey, who are they, and how do  
11 they fit into this?

12           MS. LONG: Yes. So Sarah Brice, my understanding is  
13 that she is also a nurse in our sort of clinical area. So  
14 that similar to Doc Web as a person, she is also kind of a  
15 consultant nurse. So it is similar to Doc Web in that we  
16 middleman to them for marketing. We middleman to her for  
17 clinical issues. So I think the majority of the  
18 communications with Sarah Brice are sort of, you know, how  
19 does this thing work.

20           Again, I'm not sure what they -- you know, whether  
21 they interacted with her. We could produce -- my  
22 understanding is that she is a consultant. So I would say  
23 that I think we probably have a consultant agreement with her.  
24 I can't say a hundred percent.

25           THE COURT: Well, that's in your possession, custody,

1 and control.

2 MS. LONG: But I can ask the client to go back and  
3 look for that.

4 Lori Mackey would not have a contract. She is a  
5 current Cynosure employee in the contracting department.

6 THE COURT: What does that mean, "contracting  
7 department"?

8 MS. LONG: I think that that has to do with the  
9 initial purchasing.

10 THE COURT: Okay.

11 MS. LONG: But I can't give you more specifics beyond  
12 that as to what her role and responsibilities are. But the  
13 way that this request is worded now, you know, it is a single  
14 Cynosure employee, any e-mail that she ever sent to anyone  
15 else in the company.

16 THE COURT: All right. If you have contracts or  
17 agreements for Sarah Brice or Lori Mackey, produce those, and  
18 produce any correspondence or e-mails between Sarah Brice and  
19 Lori Mackey with any of the named plaintiffs.

20 MS. LONG: Okay. I think we have already done that,  
21 but we will confirm. We may have.

22 THE COURT: Okay. That's what you are going to do --

23 MS. LONG: Yes.

24 THE COURT: -- if you haven't done it already.

25 MR. BRUCE: And just so you don't think ill of me,

1 based on your ruling --

2 THE COURT: I don't think ill of you.

3 MR. BRUCE: No, no, because I don't want you to be  
4 like "Why is he doing that? I just said no."

5 So if they are not willing -- they don't represent  
6 this man, Dr. Stephen Mulholland. He is part of their  
7 whole -- this is a false advertising case, right? I'm saying  
8 the machine doesn't work, that is. They have got this man on  
9 retainer. Now I'm just learning that I was right. Upon  
10 information and belief, what I told you I didn't know now has  
11 been confirmed. He is on -- they are paying this guy. They  
12 are paying this guy to go out and peddle this.

13 This is a false advertising case. It is obvious to  
14 me that communications between them and him about how to sell  
15 this machine is not only discoverable and relevant. I  
16 understand your ruling. You are saying he is not an employee  
17 of theirs and they don't have to give us the e-mails.  
18 Probably today, if today is Monday, by Good Friday, I'm going  
19 to serve by Friday, I'm going to serve this man, wherever he  
20 lives, with a subpoena asking for any and all e-mails between  
21 Cynosure and them, and then they might come running in here  
22 saying, "Well, we represent him." I just don't -- I mean, I  
23 don't want to -- we are going around in circles.

24 THE COURT: We will see how that goes. And I'm not  
25 going to be here Good Friday.

1           MR. BRUCE: Okay. All right. I will issue the  
2 subpoena. Thank you.

3           THE COURT: Okay. Hold on one second. It's 2:45.  
4 When did we start, 1:30?

5           Why don't we take a quick review.

6           Okay. We are going to take a quick break. Some, but  
7 not all, of the things we will talk about when we get back are  
8 the attorney-client issue -- attorney-client privilege issue  
9 with regard to, I believe it is, Defendant's Interrogatory  
10 No. 18. We need to talk about that.

11           We definitely need to talk about what the  
12 investigation has entailed to date.

13           MR. BRUCE: I'm sorry?

14           THE COURT: What the reasonable investigation has  
15 entailed to date.

16           And then we are definitely talking about how a  
17 company doesn't know the price of its product that it sold,  
18 okay? Because that I'm just -- I'm going to have real trouble  
19 wrapping my head around.

20           Okay. We will take a quick break, and then we will  
21 come back and talk about those three things and anything else  
22 we need to talk about, okay?

23           MR. BRUCE: Okay. Thank you, Judge.

24           MR. SAMORE: Thank you.

25           (Recess taken.)

1           THE COURT: Okay. Let's talk about -- and that was  
2 supposed to be the easy part. That was the easy part. Now we  
3 are heading into the teeth of the matter.

4           Let's talk about -- I think both of you wanted to  
5 talk about -- it seems like you are both loaded for bear on  
6 this. It is the attorney-client privilege issue.

7           Hold on here.

8           Yes, okay, it is defendant's motion to compel,  
9 Interrogatory 18, "Identify any and all bases for your  
10 allegations that Cynosure 'knew' or 'was aware' its  
11 representations regarding the PicoSure product were false."

12           And then we have got an attorney-client issue. We  
13 have got all kinds of things. Attorney-client issues, these  
14 type of things, are really fact driven.

15           So let me hear from Mr. Samore. Give me some  
16 context. I understand the request, but give me some context  
17 for it. I want to hear what your perspective is. And then I  
18 will ask Mr. Bruce.

19           Go ahead, Mr. Samore or Ms. Long, either one.

20           MR. SAMORE: This is our request for their  
21 communications with class members. It is very simple --

22           MS. LONG: It is not, no.

23           MR. SAMORE: I just want to make sure I'm on the  
24 right topic.

25           THE COURT: Interrogatory 18.

1 MR. SAMORE: Defendant's Interrogatory 18.

2 THE COURT: Yes.

3 MS. LONG: Yes.

4 MR. SAMORE: Yes. So, essentially, Plaintiffs have  
5 the burden of establishing a privilege. There is no question  
6 that communications between putative class counsel and  
7 putative members is not attorney-client privilege under normal  
8 circumstances. In their response, for the first time they  
9 asserted that they were being consulted and were providing  
10 consulting professional services.

11 My position is if that's the case, I think we can  
12 deal with this very quickly. They clearly have the obligation  
13 to identify who they spoke with, when they spoke with them,  
14 the subject matter, and so forth, in order to lay a foundation  
15 for the privilege.

16 THE COURT: Okay. All right. Mr. Bruce, give me  
17 some context here.

18 MR. BRUCE: This is first semester of law school,  
19 Judge. If I gave him what he is asking for, the ARDC would  
20 have my ticket. If Joe Jones in Nebraska hears about this  
21 lawsuit and calls me, e-mails me, sends me a letter and says,  
22 "Hey, I want to join. Tell me about your lawsuit. I have got  
23 this thing. It is a piece of, you know, whatever," that's him  
24 seeking my counsel, period, full stop, end of story. We don't  
25 have to go through the charade of attorney-client privilege.



1 End of story. That is protected, and that is protected  
2 whether or not I ultimately decide to take him on as a client,  
3 whether he decides to keep me as a lawyer. I can't give that  
4 information at all.

5 And his suggestion is laughable that I'm going to go  
6 through all these different communications and say, "Okay,  
7 this guy called me on this date, this guy." Is he going to  
8 give me every privilege log of him and Cynosure? No, I didn't  
9 ask for that, and that's not --

10 THE COURT: That's mutually assured destruction.  
11 That's mad. But I'm not so sure that's what they are asking  
12 for.

13 MR. BRUCE: Well, that's what I heard him ask.

14 THE COURT: Okay. Go ahead. I will come back to you  
15 in a second.

16 MR. BRUCE: He told me he wants those communications,  
17 and I'm saying they are privileged, period, full stop, end of  
18 story.

19 THE COURT: Okay. I think they are looking for  
20 something broader and different, so let me find out.

21 MS. LONG: So we don't dispute if Joe Jones calls you  
22 up and says, "Hey, give me some legal advice about that  
23 lawsuit," even if you haven't signed a retainer, that's  
24 privileged. Great. Put it down if you have a written copy of  
25 that. Obviously, if it is a phone call, there is no privilege

1 log for that. If there is a document, there is an e-mail,  
2 tell me Joe Jones sent it to you, tell me who it was and say,  
3 "Requesting information about this litigation." You have to  
4 support the privilege.

5 If Joe Jones sends you an e-mail and says, "I can't  
6 believe you are doing this litigation; I love the PicoSure; It  
7 is fantastic; This litigation is terrible," that's not seeking  
8 legal advice. Every communication between a person and a  
9 lawyer is not privileged. It has to be for the purpose of  
10 seeking legal advice.

11 THE COURT: Okay. All right. So they are -- it is  
12 an assumption that somebody called you, that they saw the  
13 lawsuit and were angry.

14 MR. BRUCE: I will say as an officer of the court  
15 that I have received no communications that I recall since I  
16 started this lawsuit with people calling or communicating,  
17 saying, "I bought it. It is a great thing."

18 THE COURT: All right.

19 MR. BRUCE: I will say that.

20 THE COURT: Anybody call and complain about the  
21 lawsuit, other than opposing counsel?

22 MS. LONG: How about any communications that didn't  
23 request legal advice?

24 MR. BRUCE: No, I'm not --

25 MS. LONG: They are not privileged.

1 THE COURT: Hold on.

2 How would it be relevant, then?

3 MS. LONG: Related to the litigation.

4 THE COURT: Okay. So if he gets a call from a  
5 reporter, would that need to be produced?

6 MS. LONG: No, because we have putative class  
7 members.

8 THE COURT: Okay.

9 MS. LONG: The request is limited to putative class  
10 members.

11 THE COURT: So someone who purchased the machine, who  
12 called, communicated in some manner with Plaintiffs' counsel  
13 about the litigation. So it is people who, by definition,  
14 purchased the machine, contacted Plaintiffs' counsel about the  
15 litigation, but not seeking legal advice. Do you have any of  
16 those?

17 MR. BRUCE: I have no --

18 THE COURT: Well, first of all, is that what you are  
19 looking for?

20 MR. SAMORE: I am looking for a privilege log. I  
21 don't know that it is overly burdensome. There may have been  
22 three people. There may have been ten people. I don't know.

23 THE COURT: Can you answer the question, though? Is  
24 that what -- I want to know what you are looking for.

25 MS. LONG: That's what we would like to be produced.

1 Those are the documents we would like produced. We would also  
2 like a privilege log telling us that the other ones exist.

3 THE COURT: Again, so that's what you are looking  
4 for?

5 MR. SAMORE: But ultimately, I mean, if there were,  
6 for example, solicitations, that clearly would not be -- if  
7 this was the Plaintiffs' firm --

8 THE COURT: See, that's why I ask these questions.

9 MR. SAMORE: Yes, right.

10 THE COURT: And I said I think they are looking for  
11 something bigger. So that's why I asked you what are you  
12 looking for.

13 MS. LONG: Yes.

14 THE COURT: So now that's -- solicitations, that is a  
15 whole -- what did you say, kettle of fish? That's a  
16 whole -- that's not kettle of fish. That's like squid in a  
17 different country.

18 All right. So any communications -- two things now  
19 we know: One, communications from putative class members, so  
20 somebody who purchased the machine, contacted you about the  
21 litigation, but wasn't seeking legal advice. Do those even  
22 exist?

23 MR. BRUCE: I don't think so, No. 1, and, no, I'm not  
24 going to get into -- I mean, I will talk to you about it, but  
25 the context has been people are not happy with the machine and

1     they are seeking legal advice. That's it, Judge.

2             THE COURT: Okay.

3             MR. BRUCE: And I have never in 26 years filed a  
4     privilege log for attorney-client communications, so I haven't  
5     done that. Maybe that's something new.

6             What was the other thing? I haven't solicited. I  
7     have never solicited.

8             THE COURT: Hold on a second.

9             So that's one. They don't have them. Your  
10    representation is no one -- no putative class member has  
11    contacted Plaintiffs' counsel about the litigation that wasn't  
12    seeking legal advice. So there is your answer to that.

13            You are also asking about solicitations, so talk to  
14    me about that.

15            MR. SAMORE: Well, I mean, I would like to hear from  
16    the other counsel on this. Solicitation is clearly not  
17    privileged.

18            THE COURT: Can you play my game?

19            MR. SAMORE: Okay.

20            THE COURT: So I'm asking you -- we have got one  
21    issue that we have clarified what you are seeking. They don't  
22    have them. You also mentioned solicitation. So now I'm  
23    turning to you to ask you to flesh out for me, to give me  
24    context, what you're looking for and why.

25            MR. SAMORE: Okay. We were looking for

1 communications between counsel and potential class members  
2 with respect to whether they wanted to join the lawsuit, if  
3 there was a solicitation. That would be -- that would be  
4 potentially relevant.

5 But let me just cut right to it. I think, as I  
6 understand the rule, they have the obligation to establish  
7 attorney-client privilege. If he produces a privilege log,  
8 this whole issue may be gone, and there may only be five.

9 THE COURT: The first step is what are you asking  
10 for. And that's what I'm stuck on right now. And now I know.  
11 Now I know what you are looking for --

12 MR. SAMORE: Yes.

13 THE COURT: -- is whether Plaintiffs' counsel  
14 solicited, looked for, contacted other putative class members.  
15 That's what -- and I want to know. I just want to make sure I  
16 have got my head on this issue and I know what you are asking  
17 for. That's what you are looking for, right?

18 MR. SAMORE: But in addition, if they were contacted  
19 by a putative class member --

20 THE COURT: We already talked about that and resolved  
21 that.

22 MR. SAMORE: Okay.

23 THE COURT: Okay. So, look, if you haven't figured  
24 it out now, I'm very compartmentalized. I try to be simple.  
25 Issue one, were they contacted, we resolved that. Now we are

1 talking about solicitation.

2 So was there any solicitations that were sent out?

3 MR. BRUCE: No.

4 THE COURT: Okay. And that resolves that. There are  
5 no documents.

6 MR. SAMORE: Okay.

7 THE COURT: So we don't even need a privilege log,  
8 okay?

9 MR. BRUCE: Yes.

10 THE COURT: Okay.

11 MR. BRUCE: Right. I just want to be clear, Judge,  
12 that there is absolutely people that have contacted me  
13 regarding my legal advice that are putative class members. I  
14 have represented that, and I'm representing that to you. And  
15 if we get to the end of this hearing today, one of the things  
16 I want to tell you just up front, an issue, is we are going to  
17 be adding some more plaintiffs, to my point. It is not just  
18 four people. There is many others. So we are going to be  
19 adding some plaintiffs.

20 THE COURT: Okay.

21 MR. BRUCE: Mr. Samore wants to push this case, so we  
22 are going to give him more feed for --

23 THE COURT: So let me pause you there.

24 Hypertechnically, everybody who has contacted,  
25 including the named class members that filed a complaint, they

1 have contacted Plaintiffs' counsel, I'm sure there is  
2 communications. There is probably an engagement agreement and  
3 all kinds of stuff. You are not seeking that, are you?  
4 Because if you sought that, then they would say, "Okay, give  
5 me a privilege log of every time you e-mailed your general  
6 counsel."

7 MR. SAMORE: Yes.

8 THE COURT: And you don't want to do that, play that  
9 game, right?

10 MS. LONG: No, I think that's why we said putative  
11 class members as opposed to named plaintiffs.

12 THE COURT: Okay. So we are good on that. All  
13 right. So no solicitations.

14 Go ahead.

15 But you have made your representation. People have  
16 contacted you. Again --

17 MR. BRUCE: Some I have taken, some I haven't.

18 THE COURT: All for the purpose of legal advice?

19 MR. BRUCE: Yes, and about this litigation, and  
20 that's privileged.

21 MR. SAMORE: Your Honor, just like, I mean, they want  
22 no surprises with respect to their statements that their own  
23 clients made at depositions, we don't want --

24 THE COURT: Hold on one second.

25 (Brief pause.)



1 THE COURT: All right. So I interrupted you.

2 MR. SAMORE: So we don't want to be surprised. And,  
3 also, I didn't hear Mr. Gravino indicate that there was no  
4 solicitations on his end.

5 MR. GRAVINO: I can similarly represent that to the  
6 court, your Honor.

7 THE COURT: And you, counsel?

8 MR. HOLEVAS: No solicitations.

9 THE COURT: Okay. All right. And you said you  
10 didn't want to be surprised. Anything else? I didn't want to  
11 cut you off.

12 MR. SAMORE: No, your Honor, that's it. Thank you.

13 THE COURT: Okay. See, I had that as a difficult  
14 issue, and we worked right through it.

15 Okay. Talk to me about --

16 MR. SAMORE: I --

17 THE COURT: Go ahead.

18 MR. SAMORE: No, I'm sorry.

19 THE COURT: All right. Talk to me about -- let me  
20 make sure I understand this correctly. It sounds as though  
21 the Defendant is saying it does not know the price of the  
22 product it sold to the putative class members. Is my  
23 understanding correct?

24 MS. LONG: So we know the price paid by each person  
25 who purchased it.

1 THE COURT: Okay.

2 MS. LONG: But in order to compare apples to apples,  
3 there is math that needs to be done manually because sometimes  
4 they purchased --

5 THE COURT: Let me pause you right there. They just  
6 want to know the price, right?

7 MS. LONG: They want to know the price of the  
8 PicoSure workstation, but if someone bought a PicoSure  
9 workstation and another couple of lasers, and also some  
10 optional upgrades and maybe this marketing package, that all  
11 goes into the final price. So I could give you a price, but I  
12 couldn't tell you that that price is for the PicoSure as  
13 opposed to the PicoSure and a lot of other things.

14 THE COURT: So the invoice -- I assume there is  
15 invoices, right?

16 MS. LONG: Yes.

17 MR. SAMORE: Yes.

18 THE COURT: Okay. So the invoice will be X number of  
19 dollars, but in the X number -- it will say total, X number of  
20 dollars, but cooked into the X number of dollars are, could  
21 be, the machine, plus that Doc Web Service deal, plus some  
22 other things, maybe marketing and other things. That all gets  
23 cooked into the X dollars, is that what you are telling me?

24 MS. LONG: Uh-huh.

25 MR. SAMORE: Yes.

1           THE COURT:   Okay.   And the price of the machine is  
2   going to be different?

3           MS. LONG:   I think it is sometimes -- I don't know if  
4   you have ever purchased something, you know --

5           THE COURT:   I've purchased a few things.

6           MS. LONG:   -- and you get something at the store, and  
7   you get a big discount, \$25 off if you buy \$50, but then you  
8   try and return one thing, and it is not always clear what you  
9   are going to get back because it went into this larger  
10   calculation.   I don't know.   That has happened to me.

11          MR. SAMORE:   And we could produce the invoices.   This  
12   is very confidential and proprietary information.   They have a  
13   competitor that may have helped fuel this, maybe a source of  
14   some information for the Plaintiffs.   So if we do produce the  
15   invoices, we would ask that they be produced solely for  
16   attorneys' eyes only.   That may be a way of resolving it.   And  
17   it may include a bunch of --

18          THE COURT:   Theoretically, you could show them 450  
19   invoices, right?

20          MR. SAMORE:   Yes.

21          THE COURT:   Right?   And that's what I wrote down, 450  
22   PicoSures sold.

23          MR. SAMORE:   Yes.

24          THE COURT:   Okay.   So we know that there are 450  
25   invoices, documents, hard documents, that will have the price

1   paid, maybe some other things cooked into them or not cooked  
2   into them, but the price for that machine will be included in  
3   that document, right?

4               MS. LONG:   The price for that transaction.

5               THE COURT:   Well, that's why I just did the whole  
6   analysis with you.   The X dollars is the price for the whole  
7   transaction.

8               MS. LONG:   Uh-huh.

9               THE COURT:   In there, again, having purchased  
10   products many times, there will be on one column the things  
11   you purchased, and at the bottom, it will say the total.   So  
12   are you just telling me there is a total and not a separate  
13   demarcation for the services, the web service and the machine?

14              MS. LONG:   I actually haven't seen an invoice, your  
15   Honor, so I can't answer that, but I think that we could  
16   produce the invoice attorneys' eyes only and let Plaintiffs  
17   know that that's what we have.

18              THE COURT:   And that will get you the information you  
19   want regarding the price, right?

20              MR. BRUCE:   Yes, your Honor.

21              THE COURT:   All right.   That seems reasonable.   All  
22   right.

23              MR. BRUCE:   Yes.

24              THE COURT:   Okay.   Do we have a protective order in  
25   this case?

1 MR. GRAVINO: We do.

2 MS. LONG: I'm not sure that it has an attorneys'  
3 eyes only designation within it. I think there is a  
4 confidential designation, but I'm not sure that it is that  
5 restricted.

6 THE COURT: Let me do this: I don't like attorneys'  
7 eyes only because it makes it hard for either side to litigate  
8 your case. I will include it, but they need to be able to  
9 talk to some client about it so they can litigate their case.  
10 It is hard to -- attorneys can't get information in a vacuum  
11 and then go, "Oh, great, I know this," and not talk to the  
12 client and figure out how it works. So I am open to limiting  
13 the review to attorneys and then maybe a subset.

14 MR. BRUCE: Judge, this is getting -- respectfully, I  
15 would like to comment on this.

16 THE COURT: Go ahead.

17 MR. BRUCE: They don't want to give us in this simple  
18 case the most basic stuff. I want the contracts between each  
19 of those 450 people. It is asked for over and over. I want  
20 the contract that they had. It is a two-page whatever. I  
21 want the contract, and I also want the invoice. These are not  
22 complicated issues, right? They won't give me the most basic  
23 things.

24 Now, after fleshing out what I think was an obvious  
25 fact for like ten minutes and wasting everybody's time, "Yes,

1 we have an invoice that shows what they paid for," I don't  
2 want to now get carried down a rabbit hole which is "Oh, it is  
3 attorneys' eyes only." They want to do anything -- they want  
4 to obfuscate this issue.

5 Judge, I have told you in this court and I have said  
6 in briefs what we are claiming in this case. I have cited to  
7 you over and over the specific UCC provision, and there is a  
8 definition in the UCC that talks about how to calculate  
9 damages. And I'm paraphrasing, so I'm not making  
10 representations. I don't have it in front of me. But,  
11 ostensibly, it is the price, the value of what you paid for it  
12 versus what the defective product is as sold on the open  
13 market, what it is as defective.

14 So if you said the car is worth -- it goes 60 miles  
15 an hour, and it goes 5 miles an hour, the price is what was  
16 the cost of the car that goes 60 miles an hour, let's say it  
17 is ten bucks, and when you sell it after everybody knows it is  
18 defective, what is the value of the car that goes 10 miles. I  
19 mean, it is not more complicated than that, right?

20 So I think -- I can't imagine a situation where I'm  
21 going to get through them, the invoices, what they sold. It's  
22 just this 450 people. It is not 10,000. It is a class  
23 action. It is not 10,000. It is not 5,000. It is 450  
24 people. I'm going to take that list, and I'm going to give it  
25 to my economist and the people that are involved, and if it

1    says "attorneys' eyes only," I don't want to have to come back  
2    in here, to court.

3               THE COURT:   And I would allow you -- like I said, you  
4    have to be allowed to share with somebody, but let me pause  
5    you right there.

6               Is there something on the invoice that says it is  
7    privileged?  Because it is --

8               MR. GRAVINO:  Judge --

9               THE COURT:  Hold on.

10              Because if it is just an invoice that Cynosure gives  
11    to its customers, I'm not sure how that is proprietary,  
12    confidential, or falls under trademark or copyright or any  
13    other kind of privilege that would exist.

14              MR. SAMORE:  I think the pricing information is  
15    proprietary information.  And under the case law, I think the  
16    way a product is priced is proprietary.

17              THE COURT:  The under -- I agree with you that the  
18    underlying way that you determine a price of a product is  
19    absolutely confidential.  I mean, that's how you figure out  
20    your profit margins, right?

21              MR. SAMORE:  Yes.

22              THE COURT:  But the ultimate price itself, especially  
23    if it is on a document that you give to a third party, how is  
24    that --

25              MS. LONG:  I think it is the aggregation.

1 THE COURT: What do you mean aggregation?

2 MS. LONG: Concerning what one person paid for it  
3 versus what everyone has paid for the PicoSure. There is a  
4 lot of information that becomes available in the synthesis of  
5 the aggregate of information when you know what each and every  
6 person paid, which one person getting one invoice doesn't have  
7 the context of all of the rest.

8 MR. SAMORE: Yes.

9 THE COURT: I mean, it is going to have a price for  
10 the product, right?

11 MS. LONG: I think it doesn't have a sticker price  
12 the way that you are thinking, you know, the way that one  
13 thinks of a receipt that pops up with a sticker price of a  
14 product, I think. So it doesn't have that.

15 THE COURT: So some got deals and some didn't get  
16 deals. Is that right, that some people got a better deal than  
17 others, maybe because they bought the web service thing?

18 MR. SAMORE: Over time, the price changed.

19 THE COURT: That's a different issue, but I don't see  
20 how that would be confidential.

21 MR. SAMORE: Right.

22 THE COURT: I mean, gas prices change every hour.

23 MR. SAMORE: Right.

24 THE COURT: Okay.

25 MR. GRAVINO: Judge, if I could, very briefly on



1     that, as you noted, the contract and the invoice that they  
2     actually give to the buyers has the price right on it. When  
3     our client contacted us, Hartsough Dermatology, some time ago  
4     and said, you know, "We want you to look into this," they gave  
5     us the contract with the price on it, and it doesn't have any  
6     attorneys' eyes only. Under the protective order, they have  
7     to have a good faith basis to designate something as  
8     attorneys' eyes only, and I don't want to be unhelpful --

9             THE COURT: Well, they are telling me there is no  
10     attorneys' eyes only provision at all.

11            MR. GRAVINO: I thought it had a two step, but under  
12     any protective order, there has to be a good faith basis to do  
13     that, Judge, and since it is on the contract that they already  
14     gave to our client and others, without putting confidential  
15     attorneys' eyes only, I'm having a hard time understanding why  
16     we should be -- it is really going to make this a headache,  
17     especially when we sit down at the next phase and try to  
18     calculate, as Devon said, the purchase price -- or the fair  
19     market value. We need to know the starting point of the  
20     selling price.

21            THE COURT: It is not going to be that difficult  
22     because I will certainly allow your -- even if there were  
23     attorneys' eyes only, I would certainly allow any experts to  
24     view it so you can come up with a number.

25            Hold on. I will answer a question here.

1 Confidential, confidential.

2 MR. GRAVINO: Judge, I would anticipate that we would  
3 move to lift that at some point. We wouldn't be able to put  
4 our case on without that information.

5 THE COURT: All right. Hold on.

6 Confidential, subject to a protective order.

7 I am not seeing an attorneys' eyes only in the  
8 confidentiality order, just a general protective order. No  
9 attorneys' eyes only.

10 Produce them subject to the confidentiality order,  
11 and if it becomes an issue, I will let you know. All right.  
12 So stamp them as confidential. I am highly suspect that they  
13 are. But at some point -- so you will be allowed to share  
14 with all the people that are listed, including experts and all  
15 that, but you can't post them on the Internet.

16 MR. SAMORE: Can't post them.

17 THE COURT: Okay. If at some point we need to  
18 address it, we will address it, but you will get them.

19 MR. GRAVINO: Thank you, Judge.

20 MR. BRUCE: Thank you.

21 THE COURT: So that's the 450 invoices.

22 Counsel, parties, contractors, consultants, experts,  
23 witnesses at depositions, you are fine for now. It won't hold  
24 things up. Okay.

25 MR. BRUCE: Mr. Holevas is making the point that

1 maybe I'm going to say something at my peril because you have  
2 got an organized way to go through this. Mr. Holevas is  
3 asking "Did he mean to include those contracts of each of the  
4 450?" Because like the contracts that we have actually have  
5 the price. I think it is even filed in court.

6 THE COURT: Okay.

7 MR. BRUCE: You know what I'm saying, Judge? You  
8 know, like when they filled out the form contracts, I think  
9 the pricing -- I could be mistaken -- I think it is in there.  
10 It doesn't matter whether it is in there or not. We wanted  
11 the contracts for each of these 450 people.

12 MS. LONG: We produced all of the -- we produced  
13 exemplars of every contract that we have ever used.

14 THE COURT: Well, there is 450, contracts, right? I  
15 can't imagine a business's file management system where  
16 pulling up contracts would be difficult.

17 MR. SAMORE: Yes, but it is 450 times. I mean, that  
18 is a lot of -- I mean, for each one, it takes time. That's  
19 all.

20 THE COURT: It is a two-page contract, right?

21 MR. SAMORE: Yes, I believe.

22 THE COURT: So it is 900 pages?

23 MS. LONG: I think they are not stored together.

24 THE COURT: How are contracts kept at this major  
25 national business?

1 MS. LONG: Yes, so I think that we have our -- my  
2 understanding, and, again, I will caveat this a little bit,  
3 but we have produced to them all contracts that we have used  
4 to sell the PicoSure without client-identifying information.  
5 Every iteration of the contract that we have used has been  
6 produced, and those are centrally stored, so I believe that  
7 those were kind of pulled and tada. But each individual  
8 contract that is filled in with the client name lives in the  
9 client file.

10 THE COURT: Okay.

11 MS. LONG: Which for many of them, and probably most  
12 of them, lives online, but for older sales, lives in hard copy  
13 documents, which would require going to hard copy documents  
14 if you are looking for the contract that has been filled in  
15 and retrieving them from that file.

16 THE COURT: How many years back are we going here?

17 MR. BRUCE: It is not that long, Judge.

18 THE COURT: Like 2011? Were they doing hard copies  
19 in 2011?

20 MS. LONG: The client has told me that some previous  
21 sales have files that only are in hard copy.

22 MR. GRAVINO: Judge, I think the FDA approval was  
23 like 2012-ish. So they have only been out since 2012 or 2013.  
24 They weren't allowed to sell the first unit until they got the  
25 FDA approval. So this doesn't go back to the dark ages.

1 MS. LONG: Let me say that there is a chance that I'm  
2 thinking of the Revlite product, which they have also asked  
3 for, potentially, a calculation of everything with the  
4 Revlite. I guess I can't say a hundred percent that the hard  
5 copy files are PicoSure or Revlite.

6 THE COURT: The contracts need to be produced unless  
7 there is some affidavit, specific information that explains to  
8 me how a company of this size and this sophistication can't  
9 produce 450 contracts.

10 MS. LONG: Okay. It is just going to take a little  
11 bit of time.

12 THE COURT: I mean, how long? This is kind of stuff  
13 that, quite honestly, I'm surprised wasn't identified in a  
14 26(a)(1) disclosure, right? Isn't that -- they have been  
15 grumbling about it from day one.

16 MR. SAMORE: You know, your Honor, actually, the  
17 theory behind --

18 THE COURT: Go ahead.

19 MR. SAMORE: It is just -- I mean, some people will  
20 say, look, they want to take depositions of every class  
21 member. I mean, to produce this granular information for  
22 every class member is burdensome, and it is very -- it is  
23 unusual at this point in the litigation, before the court has  
24 ever said this can ever be certified, before it can ever be.  
25 So I think that the better practice, I mean, would be to wait

1     until after --

2                 THE COURT: I'm asking how it is burdensome, and I'm  
3     going off of my life experiences, plus my experience as an  
4     attorney. I did a lot of commercial litigation, including UCC  
5     work, and I can't imagine in that context and with where I'm  
6     coming from as this being difficult to produce 450 contracts  
7     that are two pages each.

8                 MR. SAMORE: Okay.

9                 THE COURT: If for some reason, some bizarre reason,  
10    your client does things, and they put their contracts pursuant  
11    to astrological signs, okay, we will see, and then maybe  
12    boohoo on them for keeping bad business record management.

13                But, you know, absent hearing some reason why  
14    producing 450 contracts, 900 pages, which in the scope of  
15    large commercial cases is a flyspeck, right, than what we are  
16    used to these days, those will be produced.

17                MR. SAMORE: Okay.

18                THE COURT: All right. We are going to come back to  
19    that.

20                All right. So there was attorney-client. That was  
21    the invoice issue.

22                Okay. Talk to me about this reasonable investigation  
23    that was done to gather documents and things like that. And,  
24    look, I get it. It is asymmetrical. That's the unfortunate  
25    life of most defendants in litigation. Then there is burden,

1 and that's why the rules talk about proportionality. So tell  
2 me what was done.

3 MS. LONG: So we, initially, went over the requests  
4 with a representative from the legal department, who kind of  
5 digested them and thought about which department would be most  
6 likely to have responsive communication and engaged those  
7 departments. You know, they include quite a few, which I  
8 think we went over in the class 4 declaration. So we have got  
9 clinical, regulatory, marketing, sales reporting, IT, service,  
10 finance, and legal, and those departments were sent their  
11 requests where they might have responsive documents, and then  
12 there was a specific document pull when there was the thought  
13 of specific documents.

14 When it comes to e-mail searches, that's where it  
15 gets particularly burdensome, and so here's what we didn't do  
16 in response to the request for every -- basically, there are a  
17 couple of requests, but they amount to every e-mail  
18 communication with every putative class member, and that gets  
19 complicated because Cynosure has about 150, 200 sales staff,  
20 and those are the people who are most likely to have  
21 communications with clients, although, again, the relationship  
22 with the client and the company is ongoing beyond the sale.  
23 It is not, sort of, you buy a laser and walk away. The  
24 clients or customers continually reach out with questions  
25 about service or training or clinical questions. So there are

1 a lot of those communications, even just among the sales  
2 staff. They talk to between one and five people depending on  
3 the region because there are regional managers and territory  
4 managers and things like that.

5           So for each -- that's what we did for each of the  
6 named plaintiffs. We basically pulled their files and  
7 determined which one to five people in this sales hierarchy to  
8 search, and then we put together search terms for the  
9 Plaintiffs. This is a particularly difficult context for that  
10 because, let's say, we sell a laser to ABC Clinic. ABC Clinic  
11 has, you know, Doctors A and B who work there. Maybe they  
12 have Admin C who does a lot of their e-mailing. So figuring  
13 out the search terms for the names of people who represent  
14 that purchaser is sort of another added layer.

15           And then we ran the searches in the relevant team  
16 members' texts and e-mail. That has to be privilege reviewed  
17 because there is not a way to search it just in the to/from  
18 fields to narrow only communications that came to or from a  
19 third party because you have to be searching by the name,  
20 because I don't know if ABC Clinic's e-mail address is, you  
21 know, Dermatology XYZ at Gmail or Yahoo. I can't search the  
22 to/from field. I have to search content. So those might pull  
23 back e-mails that are between counsel or that have to do with  
24 the litigation.

25           We can't search PicoSure because PicoSure comes up in



1 the signature box or the signature line of the salespeople  
2 because they sell the PicoSure. So if we just searched for  
3 PicoSure, it comes back with all of the salespeople.

4 THE COURT: But you can do a search -- I mean, how  
5 many attorneys are we talking about? You can just do a simple  
6 search of that subset and find Ms. Long, Mr. Samore, all  
7 those, right? You will find those. That's an easy cull out.

8 MS. LONG: And people that -- you know, and we would  
9 have to include the paralegals and people who are asking the  
10 departments, because if the attorney asks the paralegals, who  
11 ask --

12 THE COURT: How many would those be?

13 MS. LONG: Personally, in my practice, I like to  
14 review pretty closely for privilege because if a paralegal  
15 asks nonlegal person A, and nonlegal person A asks nonlegal  
16 person B "I need this for Jean," which is the name of a  
17 paralegal, that follows privilege because it is work product,  
18 because it is, you know, work product. It is at the request  
19 of a lawyer. So I'm not sure that we can just pull out  
20 attorney names. We have documents. You know, privilege  
21 exists in context.

22 THE COURT: Right. But they only exist -- privilege  
23 is only going to exist if there is somebody seeking legal  
24 advice and there is a lawyer in the mix, right? So a  
25 paralegal could do it, the advice. So that's why I'm asking

1 sort of basic, simple questions, is how many -- you have got  
2 things going forward from the case. It's probably not going  
3 to be caught up in this thing, right, because they are not  
4 really looking for that. But throw your names into the mix,  
5 and you can cull those out pretty quickly.

6 In-house counsel, how many members are in in-house  
7 counsel?

8 MR. SAMORE: There are three.

9 THE COURT: Okay.

10 MR. SAMORE: In addition, at least --

11 THE COURT: How many paralegals? So we have got  
12 three more to cull out.

13 MR. SAMORE: Yes, but --

14 THE COURT: Answer my question. How many paralegals?

15 MR. SAMORE: I think there is --

16 MS. LONG: I know of at least one.

17 MR. SAMORE: There is one.

18 THE COURT: So four people you have to cull out.

19 MR. SAMORE: Okay. Your Honor, we have a system for  
20 maintaining in a centralized area every complaint that has  
21 been made, and that has been produced. People are trained to  
22 do that. They have to do it. So what's the relevancy of all  
23 of the -- there could be thousands. There could be tens of  
24 thousands of communications between these people about, you  
25 know, their training, their service, their certification, all

1 things that have nothing to do with the case. We aren't even  
2 at -- we don't even have a case that is certified that would  
3 be the subject of a ruling by the court, and it is not  
4 proportional to the needs of the case.

5 THE COURT: We don't know that yet because I keep  
6 asking these really simple questions about how many are we  
7 talking about. You can cull them out.

8 MR. SAMORE: Okay.

9 THE COURT: We have a 502 order that gives you the  
10 clawback provision that protects you.

11 MS. LONG: Yes, well, that's just on the privilege  
12 issue. So even if we put that aside, coming up, pulling each  
13 file to figure out who purchased the laser and who the  
14 relevant names to search for with regard to that purchase  
15 would require pulling each 450 sales files, because even if  
16 the invoice has a client name, I mean, they have had -- one of  
17 their clients has a d/b/a. There is -- I'm sorry, I'm  
18 blanking on the initials, but Hartsough, they have a d/b/a for  
19 the company, and there is at least one doctor who works there.  
20 So putting up a search term for coming up with the names of  
21 what to search for each of the 450 purchasers is a very  
22 individualized process.

23 THE COURT: How about using -- go ahead.

24 MR. BRUCE: Judge, I have a couple observations. You  
25 asked a simple question of them. We are way into this in

1 written discovery in terms of time and when I asked for basic  
2 stuff, right, complaints about this product. You just asked  
3 them a very simple question, "What reasonable inquiry did you  
4 do on the e-mails?" That's what you asked. And there was  
5 this big, long dissertation by counsel, who has been very  
6 candid with this court and said "I just have been on this case  
7 a month," about all the different departments at Cynosure and  
8 all the different things they have to do.

9 First of all, I think what we are hearing is they  
10 have done nothing --

11 MS. LONG: No.

12 MR. BRUCE: -- on searching for the e-mails.

13 Mr. Samore keeps coming back, "Well, we have to do this for  
14 the updating. We will give it to them, whatever they want."

15 I want to know -- I want to know -- and I have asked  
16 five ways from Sunday in different interrogatories and  
17 requests to produce, people who have made complaints about  
18 this product, the PicoSure product. I have asked for that,  
19 and I have yet -- and even if they start coming back now and  
20 saying, "This is what," there is nothing in front of you.  
21 They have not signed -- they have not filed what they were  
22 supposed to file months and months ago. When they make these  
23 boilerplate objections about unduly and burdensome, they are  
24 supposed to give the person. "Here is the person that made  
25 the e-mail search. Here are the terms that we used. We got

1 20,000 hits. It is way too hard for us." I mean, what I am  
2 hearing is, A, they haven't done it, and then, B, even if they  
3 have done it, they don't have anybody that's in front of you.  
4 This is fluff from the lawyers, one of who just started a  
5 month ago in this case, okay? So I'm a little bit bothered.

6 But what she did say was very interesting. I have  
7 asked also -- and I know you are going through, but this is a  
8 related matter. I have asked for two different things. I  
9 asked for our client's file; essentially, the file. So they  
10 sold the thing. It is like if I go and buy a Ford Escort, you  
11 know, at this place here in Rockford, over there on  
12 Perryville, if I buy that, there is going to be an invoice,  
13 there is going to be a contract, there is going to be  
14 communications. There is going to be a file somewhere,  
15 whether it is electronic, written, or both. They are going to  
16 have a file on the purchase of the Ford Escort, right.

17 I have asked for the files of the purchase for my  
18 named plaintiffs, everything in the file. I have asked for  
19 the file. I think that's fair. I have asked for it because  
20 this is a class action, and they are saying it is all  
21 different, and there is no way they are common. Well, let me  
22 test that, and this is done commonly in class actions. I  
23 asked for the file. It is not 5,000. It is not 10,000. It  
24 is not 500. Now, I'm learning today it is 450. I want the  
25 files.

1           And she said something over and over. She said, "We  
2   pulled the file. We pulled the file." I want the file for  
3   the people that bought the PicoSure machine. I want the file.  
4   This is not -- I mean, we are beating a dead horse here,  
5   Judge. I mean, they haven't done what they are supposed to do  
6   in terms of providing you with evidence why it is unduly  
7   burdensome. It doesn't sound like they have done e-mail  
8   searches, and lawyer's representations that just started on  
9   the case doesn't cut it, respectfully, with all due represent.

10           So that's it. Thank you.

11           Mr. Gravino?

12           MR. GRAVINO: Judge, very briefly, as you know from  
13   commercial litigation -- I do primarily commercial litigation,  
14   a lot of copyright and IT litigation -- we routinely do these  
15   things with forensic companies. They are talking about  
16   thousands and thousands of lawyers' hours. It is headachy.  
17   It does take time. It does take some cost. But given the  
18   nature of this case, I don't think it is unduly burdensome at  
19   all. You hire a forensic person. They come in.

20           I mean, they want to throw around odd numbers, 150,  
21   200 salespeople. How many servers are these on, I haven't  
22   heard them represent to the court. If this stuff is on one or  
23   two or three or four servers, you have a forensic company like  
24   Forensicon in Chicago come in. They make a forensic image of  
25   each server. They take it back. They work out the protocol.

1 I don't need to bore you with the details, Judge. I know you  
2 are more than familiar with this. Also, the courts are using  
3 these Sedona Principles now for culling and sifting. It is  
4 done.

5           So they want to throw around numbers about the number  
6 of personnel, but in this day and age, all the good stuff is  
7 on e-mails. Everybody knows that. People don't write letters  
8 anymore by hand. The real documents are in electronic or in  
9 e-mail form. It is very routinized to get this stuff with the  
10 forensic image. We do it all the time. Everybody I work with  
11 does it all the time. It is not fun, but it is certainly not  
12 unduly burdensome given the stakes of the case. I haven't  
13 heard anything from them about consulting with a forensic  
14 person the number of servers, the cost of this, those kinds of  
15 things.

16           MS. LONG: I will say that apart from  
17 burdensome -- they come back to sort of lack of facts on  
18 burdensome -- I want to make clear that our main argument is  
19 proportionality and the needs of the case, which doesn't need  
20 facts to support it.

21           Going back to the complaint log, I want to make clear  
22 to opposing counsel and to the court what the complaint log  
23 is. It is not something that we put some of the complaints.  
24 Any complaint that comes in to the company from any source,  
25 any e-mail, any random conversation with a maintenance

1 technician or a salesperson, any complaint that comes in is  
2 logged on here. So if we were to go and do an e-mail search  
3 that would uncover complaints, it would be duplicative of the  
4 complaints that are already logged in the complaint log. We  
5 keep this. As a regulated industry, we are subject to FDA  
6 audit. So it is a practice to include all of the complaints  
7 on that complaint log. It would be redundant to search.

8 THE COURT: But does it include all the  
9 communications regarding each complaint? That's what they are  
10 looking for. Now, whether it is unduly burdensome and  
11 proportional is a different question. What they are looking  
12 for, and they can correct me if I'm wrong, is, okay, you have  
13 given them a complaint log. Good, that may be an excellent  
14 starting point.

15 MR. SAMORE: Yes.

16 THE COURT: And I haven't seen it, and I don't know  
17 what it looks like, but that can say complaint from this  
18 customer about this machine, and there is a serial number.  
19 But I don't know if caught in that log is a sales rep talking  
20 to an engineer saying, "Oh, crap, it happened again. It  
21 didn't do what it was supposed to do. This is the third time  
22 it has happened. What is going on with you knuckleheads? I'm  
23 having trouble selling the machine. They are telling me it is  
24 not working right." That's what they want to see. Whether it  
25 exists, I don't know.



1           Would something like that be caught up in that  
2   complaint log? Because what I have just described is clearly  
3   relevant.

4           MR. SAMORE: Right.

5           THE COURT: It is not privileged, so now we are into  
6   the other issue.

7           MR. SAMORE: I think if we were to limit -- if we  
8   were to go to the complaint log, and then do a search of the  
9   people in that complaint log for the types of communications  
10   that you are talking about, I think that would be something  
11   that would be proportional and that would make sense.

12          MR. BRUCE: Judge, the complaint --

13          MR. SAMORE: And just one other thing.

14          MR. BRUCE: Sure.

15          MR. SAMORE: And that is that he talks a lot about  
16   the e-discovery. I have been involved in a lot of cases,  
17   cases where plaintiffs' attorneys and defense attorneys have  
18   search terms and they discuss about a protocol.

19          THE COURT: I assume you guys did that.

20          MR. BRUCE: No, they won't give me anything.

21          MR. SAMORE: There has been nothing, nothing from the  
22   Plaintiffs.

23          THE COURT: Well, since I am the co-chair of the  
24   Seventh Circuit Electronic Discovery Pilot Program, I have a  
25   little bit of background in this, and I push the program all

1 the time. You can go on any -- it will be on every district  
2 court judge in the Northern District of Illinois. It will be  
3 on every website in the Seventh Circuit, because I made them  
4 do it, or you can just go to [discoverypilot.com](http://discoverypilot.com), and we have  
5 got protocols on there. We have got it all laid out. So all  
6 that hard work is done. And I'm pretty confident if it comes  
7 off of the Seventh Circuit program that I am the co-chair of,  
8 I'm going to sign it. I'm going to think it is good work.

9           So that should happen, because if you are just coming  
10 up with search terms on your own, of course he is going to  
11 balk, just like if he were to dump 5,000 search terms on you.  
12 You would go, "I'm not doing all these. This is going to  
13 be -- I'm going to catch dups on this. This isn't relevant.  
14 We have got to shorten this. There is other terms."

15           That process has to occur, and that's part  
16 of -- that's cooked into is it disproportionate, because if  
17 you go through that process, you have a couple of options  
18 here. One, it is massively voluminous and hugely costly,  
19 probably not a good thing, or if what you catch is a little,  
20 tiny guppy, and you spend a lot of money, well, that's  
21 disproportionate for both sides, right?

22           But they are being about as clear as can be on what  
23 they are looking for. So they would be relevant. They are  
24 not privileged. I need to figure out if it is proportionate,  
25 and I don't have that information now because what should have

1 occurred didn't occur, and I don't know what IT people have  
2 been involved. I don't know what the systems look like. I  
3 don't know how many servers there are. I don't know if you  
4 can simply use a technology-assisted review, TAR, program.  
5 That will save you buckets of attorney hours. There is ways  
6 to reduce the cost on this, which then makes it proportional.  
7 So that takes the burden off of you and your client. There is  
8 ways to solve this, but we have got to start down that road,  
9 right?

10 MR. BRUCE: Great. Thanks, Judge. How do we start?

11 THE COURT: Take a look at the Seventh Circuit  
12 Electronic Discovery Pilot Program website. Look at some of  
13 the protocols on there. Talk about the ways you want to do  
14 it, whether you want to do search terms. If you want to do  
15 search terms. Talk about what search terms make some sense.  
16 You know, it is more of an art than a science because you are  
17 going to have to come up with a number that isn't too many and  
18 not too few. If you go with technology-assisted review, you  
19 don't even need your search terms, pretty much. So figure out  
20 which way you want to do it.

21 MR. BRUCE: Thank you, Judge, because we don't want  
22 to get -- you know, they keep trying to hang their hat on this  
23 complaint thing. I have zero confidence in that, and I have a  
24 high degree of confidence that there are people that are not  
25 happy with this PicoSure machine that appear nowhere on this

1 razor-thin complaint thing. So I am not -- and Mr. Samore  
2 cannot offload his responsibilities under the rules of this  
3 court by simply saying, "Well, we have this complaint log and  
4 everything is in there." I'm not confident. So I just want  
5 to be clear I'm not looking for just what they are saying is  
6 in the complaint log.

7 THE COURT: Well, that's why I was questioning,  
8 because it sounds like information, relevant information. It  
9 may not be captured by the complaint log. So it is relevant,  
10 non-privileged. And whether it is proportional, we will find  
11 out.

12 MR. BRUCE: Right. Thanks, Judge.

13 MR. SAMORE: Your Honor, I mean, honestly, this case  
14 has been pending for a long time, since 2000 --

15 THE COURT: Do you want to settle?

16 MR. SAMORE: Well, they are looking for a large,  
17 multimillion dollar, class-wide settlement. I have offered  
18 many times from day one to settle on an individual basis.  
19 They have no interest with his looking for the gold and the  
20 diamonds in the sky. This is a product that we believe in and  
21 that has been verified, independent, you know, 90 -- it has  
22 got an incredibly high approval rating by customers, and the  
23 only complaints we saw were not complaints. They praised --  
24 their clients praised the PicoSure after they used it for  
25 months, to the newspaper.

1 THE COURT: How would those get in the complaint log?

2 MR. SAMORE: What is that?

3 THE COURT: How would those get in the complaint log?

4 MR. SAMORE: My point is there is likely not going to  
5 be what he is looking for. We are going to go through a lot  
6 of effort, and we are not going to get anywhere. It is going  
7 to cost a lot of money.

8 THE COURT: Welcome to litigation.

9 MR. SAMORE: Yes.

10 THE COURT: How many complaints are logged in this  
11 complaint log, just number wise?

12 MS. LONG: I'm sorry, I don't know off the top of my  
13 head.

14 MR. BRUCE: It is thin, Judge. I don't know.

15 MR. SAMORE: It is a good --

16 THE COURT: More than ten?

17 MR. BRUCE: Yes.

18 MS. LONG: Yes.

19 THE COURT: All right. More than 50?

20 MR. BRUCE: I don't know.

21 MR. SAMORE: Yes, but most of them really don't even  
22 deal with the issue that they are referring to, which is the  
23 basis of their complaint, but -- I mean, we can have a  
24 conversation, if your Honor would like us to, but I think it  
25 is very --

1           THE COURT: Look, I don't force settlement  
2 conferences on people. If you want to have one, you tell me.

3           MR. SAMORE: We are happy, as we said from day one,  
4 to settle individually. We don't believe this case --

5           THE COURT: And I have said it with a total straight  
6 face: There should be more trials. There really should be.  
7 Don't tell Judge Kapala I said that. There really should be.  
8 How are you going to determine the value of things if nothing  
9 goes to trial?

10          MR. SAMORE: Yes, right.

11          THE COURT: Judges sit in chambers and work on  
12 summary judgment motions, and it makes it look very -- it is  
13 not an open, transparent process. If you get seven people in  
14 a jury box listening to the testimony, they are involved in  
15 the system. They have skin in the game. They understand the  
16 system. So there should be more trials.

17          Okay. So those are the -- we covered the things I  
18 wanted to talk about.

19          Let me start with Mr. Samore and Ms. Long.

20          MR. SAMORE: Okay. Yes, your Honor.

21          THE COURT: What issues do you want to raise that I  
22 haven't addressed?

23          MR. SAMORE: Okay. Well, we would like to address  
24 our motions to compel.

25          THE COURT: Okay. I think I have addressed some of

1     it, but, okay, hold on.

2                 Okay. Give me a production request or an  
3     interrogatory number.

4                 MR. SAMORE: Okay. Interrogatory No. 14 and 15.

5                 THE COURT: Interrogatory No. 14 and 15, which is  
6     also related Document Request No. 25.

7                 MR. SAMORE: Yes, sir.

8                 THE COURT: Okay. Go ahead.

9                 MR. SAMORE: Okay. All right. Your Honor  
10    previously, as you may recall, required compliance with these  
11    interrogatories in this production request in August. They  
12    asked for customer responses, complaints about the product, or  
13    any customers that declined to use the product.

14                THE COURT: Now, when we say "customers," we are not  
15    talking the people getting zapped. We are talking about the  
16    purchasers of the product?

17                MR. SAMORE: No, we are talking about the people  
18    getting zapped, the patients.

19                THE COURT: Okay.

20                MR. SAMORE: And your Honor specifically overruled  
21    their motion for a protective order and required compliance,  
22    and instead of complying, they objected on grounds of HIPAA.  
23    They refused to identify any customers that they had who had  
24    been zapped, who complained or declined to use service, and  
25    they did so on the basis of HIPAA, which was specifically

1 addressed by an order that your Honor entered, that was  
2 entered on September 22, 2016. And in Paragraph 3, your Honor  
3 ruled that "All covered entities as defined by 45 CFR  
4 Section 160.103 are hereby authorized to disclose protected  
5 health information pertaining to the treatment of any  
6 individual treated by any Plaintiff to attorneys representing  
7 the Plaintiffs and Defendant in the above-captioned  
8 litigation."

9 THE COURT: All right. Let me pause you there. I  
10 thought the Plaintiffs' objection -- or not objection, but  
11 response was that the complaints, general term "complaints,"  
12 were verbal.

13 MR. BRUCE: Yes, that's right, Judge.

14 THE COURT: Okay.

15 MR. SAMORE: No, no, they have not identified the  
16 customers that made the verbal objections.

17 THE COURT: Well, they can't produce documents if  
18 they are verbal, right?

19 MR. SAMORE: This is an interrogatory.

20 THE COURT: Well, that's why I said it relates to  
21 Document Request No. 25, which you said yes, and it is  
22 "Produce each and every record documenting a patient complaint  
23 or compliment regarding your treatment of that patient using  
24 the PicoSure product." So they are saying they are verbal,  
25 and if they are verbal, there is not going to be a document,



1 unless somebody said, "Hey, Sally Smith said the product is  
2 awesome."

3 MR. SAMORE: But that's actually -- I don't  
4 read -- their response was they all, essentially, just  
5 referred to all of the medical treatment records. They refer  
6 to hundreds or thousands of pages of treatment records. They  
7 don't say "none." If they would simply say they have no  
8 written records of any complaints by any of their patients or  
9 any records of any patient declining -- if we have that  
10 clearly stated on the record, that would dispense with  
11 Production Request No. 25.

12 THE COURT: Okay. Any documents?

13 MR. BRUCE: None that have not already been produced,  
14 Judge.

15 MR. SAMORE: But that -- again, what they have done  
16 is they have produced thousands of records, which we have  
17 looked and we can't find any customer complaints about the  
18 efficacy. We want them to identify. They know their patients  
19 better than we do. They were the ones that completed the  
20 records. They should be required to identify which records,  
21 instead of "Here is 5,000 records. You go look, because we  
22 can't find any."

23 THE COURT: Okay. Look, did the interrogatory  
24 response say they have been produced, and under Rule 33(d),  
25 take a look at documents, Bates numbered whatever to whatever?

1           MR. BRUCE: Judge, this is painful, right? You know,  
2 let me put this in context. They are asking -- they asked for  
3 any and all documents or something where a patient complains  
4 about the PicoSure machine. I'm paraphrasing, but that's what  
5 he asked for, and it was really his colleague, who is not  
6 here. That's what she asked for, okay? So then we did.

7           And I take umbrage with the fact that he is  
8 suggesting that I'm not complying with your order. We had a  
9 motion for a protective order. We argued it. I lost. He  
10 won. You said, "Mr. Bruce, you produce it." And so then we  
11 went through there.

12           MR. SAMORE: Can I have the answers to  
13 interrogatories?

14           THE COURT: Go ahead.

15           MR. BRUCE: So then at that juncture, right, we  
16 talked to the clients and everything. The complaints are  
17 verbal. They are oral. You know, these people are  
18 saying -- they are coming in and they are saying, "Hey, this  
19 thing is really not taking the color off like I like. It is  
20 not really working like you told me," whatever. I mean, these  
21 are the context. You have to put this in context, right?

22           So these people, they are not sending e-mails, they  
23 are not writing out a form saying, "This thing doesn't work."  
24 I don't have those, okay? Whatever we have had on that, we  
25 gave it to them. So I said exactly what you just said, your

1 Honor, you know, "See the medical records of PicoSure,"  
2 because you see this thing doesn't remove. I mean, he has got  
3 the photographs. He knows this is just all about, you know,  
4 spending a lot more time here.

5           You know, the bottom line is you can see from the  
6 photographs in the medical records -- all of which he has,  
7 right? -- which shows that, you know, photograph, butterfly,  
8 butterfly, butterfly. It doesn't go away like it does in the  
9 picture, right? It's not photoshopped. It doesn't go away,  
10 right? So we said, "See medical records of the PicoSure  
11 patients," which we have given to them. And then it was, "Oh,  
12 no, no, no, no. Please provide a response" -- they didn't  
13 like it -- "to the request by identifying all records  
14 documenting patient complaint." Okay. So now they are  
15 saying, "I don't want that. I want this specific document  
16 that says 'I'm complaining,'" right? That's what she sent in  
17 an e-mail, and I put in my response February 22nd, 2017. You  
18 have that in front of you.

19           So I gave them the answer. I thought I was being  
20 transparent, compliant with your order. I thought I was being  
21 a good guy. I said, "Look, here are the documents. You want  
22 the documents? It is there. You can see the thing is not  
23 getting removed, right?" And that's what -- you know, if we  
24 ever get to depositions in the case, they can ask these people  
25 if that's what happened, right?

1           So then I do that, and then I limit it to this, and  
2   now he is saying, "Well, he is not being compliant." Well,  
3   Judge, I don't -- I guess he is back and forth. It is a  
4   moving target. I give him the medical records. They say it  
5   is -- you know, that's indicative of a complaint. It doesn't  
6   say complaint, but I'm being overly diligent in giving it to  
7   him. And then they say, "No, we want the ones that say  
8   'complaint.'" Well, I don't have that.

9           So now he is in here before you saying --

10          THE COURT: If there is no documents that say it is a  
11   complaint, there is no documents that say it is a complaint.  
12   Now, if there is medical records that include photographs that  
13   show a tattoo that still exists or is still visible or hasn't  
14   faded, or whatever term we want to use, to the patient's  
15   desire, and there is nothing written about it, there is no  
16   document, right?

17          MR. SAMORE: No, I think he is playing a game, your  
18   Honor, because what he is saying is that nobody used the word  
19   "complaint." We are not asking whether the word "complaint"  
20   is in the records. We are asking for people that use any  
21   words they may have used to complain that, or to state, to  
22   convey, to communicate, that the tattoo removal was  
23   unsatisfactory.

24          THE COURT: He is saying he doesn't have any.

25          MR. BRUCE: And there was like a blog site or there

1 was a text. I mean, of the four plaintiffs, there was one or  
2 two, and I have given them to him. I mean, I don't have it in  
3 front of me, but we gave them to him, whatever we got, that  
4 complies with that. He just doesn't like the answer. He  
5 doesn't like the answer. There is nothing else. I mean, it  
6 is documented in the records in the sense that you have got  
7 these photographs, as you point out, and whatever.

8 MS. LONG: But that's not necessarily a complaint. I  
9 could see a picture, and it fades, and someone could be happy  
10 with that result because they know that tattoo removal means  
11 lightening.

12 THE COURT: But if he didn't write it down, he can't  
13 produce it.

14 MS. LONG: Then he can't say it is a complaint.

15 THE COURT: So they can't say it is a complaint.

16 Now, if you are deposing somebody, and these  
17 documents, these pictures get shown, and say, "What did Sally  
18 Smith say relating to this," and she says she was really  
19 pissed off that the butterfly is still there or she was really  
20 happy that it had faded so much, there is your complaint and  
21 your compliment, right?

22 MR. SAMORE: If he is saying that there were no  
23 communications from patients conveying that they were unhappy  
24 with their tattoo removal in the medical records, I would like  
25 that to be stated clearly for the record. Also, though, they

1 haven't identified any person in response to the interrogatory  
2 that made any much complaints, but I would like that to be  
3 stated clearly for the record if they have nothing said about  
4 working.

5 THE COURT: I think he has already said there was  
6 some blog thing that was produced.

7 MR. BRUCE: That's right.

8 MR. SAMORE: Okay. What blog thing are you talking  
9 about?

10 MR. BRUCE: Read the answers to the interrogatories.

11 MR. SAMORE: No, there is no --

12 MR. BRUCE: There is some text or something, whatever  
13 it is. I don't want to take up the Judge's time.

14 MS. LONG: I would love to talk about the text.

15 MR. SAMORE: There is a text, and Hatchet identified  
16 a Customer A who sent a text message. They didn't produce the  
17 text message. They didn't identify the customer. So what we  
18 have is we have at least one individual that was identified  
19 from all of them that made a complaint. We don't know who  
20 that individual is and we don't know what he said because they  
21 haven't produced the text message and they haven't identified  
22 the person.

23 THE COURT: Do you have the text message?

24 MR. BRUCE: I thought we produced it. I don't know  
25 if he has got it. It was one text message. We will try and

1 find it. I will try to find out. And I fronted the text  
2 message. I mean, it is not like I'm hiding it, if that  
3 comports to their request.

4 THE COURT: That would be responsive. That should be  
5 produced.

6 MR. BRUCE: Right. Thank you, Judge.

7 MR. SAMORE: Also, we would like to talk about the  
8 consent forms for tattoo removal.

9 THE COURT: Give me a number.

10 MR. SAMORE: Okay. It is Request No. 27 and 28.

11 THE COURT: All right. I thought I have that  
12 resolved, but go ahead.

13 MR. SAMORE: Okay. I don't think -- so because  
14 Burke's response refers to over 2,200 pages of notes, some of  
15 those notes state that written consent was obtained. We  
16 actually have a -- we have records, and I will just give an  
17 example of one of them, and that's what their answers to  
18 interrogatories -- may I approach the bench to provide your  
19 Honor with a copy?

20 THE COURT: I have two CSOs; not one, but two.

21 MR. SAMORE: So we have a plaintiff that says in his  
22 answers to interrogatories that they would obtain consent, we  
23 have written records from when they obtained written consent,  
24 and we don't have any written consent forms from that doctor  
25 that we have been able to locate.

1 THE COURT: Hold on one second.

2 MR. BRUCE: Yes, I can respond to this easily, Judge.  
3 I went out to wherever it is in Delaware, wherever it is,  
4 wherever he is at. This is Dr. Burke. He is talking about  
5 Dr. Burke. I asked him, "Do you use specific consent forms?"  
6 He said, "No." And then when this came up again, he said,  
7 "No." So I don't know what else you want me to do, Judge. I  
8 asked a doctor, and I'm invading attorney-client privilege. I  
9 asked the man if he used a consent form, and he said, "No,"  
10 and here we have it. So I don't know what -- what are they  
11 talking about. I mean, this is all spelled out in my  
12 response. Written consent of pain, what can I do, Judge? You  
13 know, I don't know.

14 THE COURT: All right.

15 MR. BRUCE: It could be boilerplate. I don't know.  
16 I mean, he --

17 THE COURT: So Dr. Burke, Thomas Burke, says in a  
18 chief complaint form written consent obtained.

19 MR. BRUCE: Maybe this is the written consent.

20 THE COURT: There is a photograph of a tattoo.

21 MR. BRUCE: Is it removed? No.

22 THE COURT: What is that?

23 MS. LONG: I spent a lot of time in this case trying  
24 to figure out what tattoos are.

25 THE COURT: So this might be the written consent. So



1 if this is all they have got, this is all they have got. But  
2 at Dr. Burke's deposition, you can ask, "Is this a written  
3 consent?" And if he says, "No, I have got a whole stack of  
4 them," well, now we have got a different problem.

5 MR. SAMORE: Well, the other problem with their  
6 response is that they indicate in their response that they  
7 don't have any consent forms, but our request wasn't limited  
8 to just the PicoSure product. It was for any tattoo removal  
9 product.

10 THE COURT: Okay. 27 is specifically the PicoSure.

11 MR. SAMORE: That's true.

12 THE COURT: And 28 is for tattoo -- "Produce all  
13 forms, documents you have used to obtain patient consent for  
14 tattoo removal using any other removal procedure."

15 MR. SAMORE: Okay.

16 THE COURT: Okay.

17 MR. SAMORE: This is a very important request because  
18 what we have found with respect to the other plaintiffs is  
19 that they required the patients to understand that tattoo  
20 removal means lightening of the pigment.

21 THE COURT: What do you mean by "other plaintiffs"?

22 MR. SAMORE: The other doctors that are plaintiffs to  
23 this case --

24 THE COURT: Okay.

25 MR. SAMORE: -- produced forms contradicting his

1 theory of the case, consistent with our position that tattoo  
2 removal does not mean making it invisible to the naked eye.  
3 It means significant lightening of the pigment.

4 THE COURT: Okay.

5 MR. SAMORE: And these forms specifically address  
6 that issue.

7 THE COURT: Okay.

8 MR. SAMORE: And it is a very cagy.

9 THE COURT: So does Thomas Burke have them or doesn't  
10 he have them?

11 MR. BRUCE: He doesn't have any consent forms, Judge.  
12 I asked him that.

13 MR. SAMORE: For any machine, for any tattoo removal  
14 machine in the last ten years?

15 MR. BRUCE: I'm trying to find -- well, we might have  
16 an objection on scope.

17 MR. SAMORE: Okay. Five years, then. Five years.

18 MR. BRUCE: What number? Where are we at?

19 THE COURT: It is Document Request No. 28.

20 MR. BRUCE: For which plaintiff? I'm trying to find  
21 the interrogatory.

22 THE COURT: It sounds like it is --

23 MR. BRUCE: Burke? Dr. Burke? Is that what you are  
24 talking about, Burke?

25 MR. SAMORE: All of the -- I want to know whether

1    they have produced all consent forms that they used in the  
2    last ten years for removal of tattoos.

3               THE COURT:   For any product.

4               MR. SAMORE:   Yes.

5               THE COURT:   And it sounds like Mr. Bruce has asked  
6    Dr. Burke if he has any consent forms, and he didn't.

7               MR. SAMORE:   Is that true for any tattoo removal?

8               MR. BRUCE:   Don't cross-examine me.   I will go and  
9    look.   Unlike you, I have made a reasonable diligence and sat  
10   down with my client.

11              THE COURT:   That's enough.

12              How long do you need to contact Dr. Burke?

13              MR. BRUCE:   I have actually asked.

14              Judge, I'm trying to find it, because I want to see  
15   how -- we are kind of glossing over this, respectfully.   I  
16   want to know what interrogatory he is talking about, and I  
17   would like to see how I responded, because that doesn't sound  
18   like that was relevant or discoverable.   I know we got into  
19   the issue of the consent forms for the PicoSure machine, and I  
20   have set forth in our response at Page 3 everything we have  
21   done.   Now they are asking a different question, and I would  
22   like to know what interrogatory they are referring to.

23              THE COURT:   It is Document Request No. 28, and it  
24   says, "Produce all forms or documents you have used to obtain  
25   patient consent for tattoo removal using any other tattoo

1 removal" -- and it says -- "product you have used in the last  
2 ten years." So that follows the 27, which is limited just to  
3 the PicoSure.

4 MR. BRUCE: And I'm just looking, as an example, at  
5 Dr. Ritacca's answers that I see. Once you read that, and I  
6 now know where we are at, I said to see the previous response  
7 on the consent forms. The question is, other than what we  
8 have already produced, are there other ones for other  
9 machines. I don't know the answer to the question. I mean,  
10 I'm not going to make a representation. I don't want to make  
11 a representation to the court if I don't know if it is true.

12 THE COURT: That's why I asked how much time do you  
13 need.

14 MR. BRUCE: So I'm going to ask before I represent to  
15 the court.

16 THE COURT: Okay. How much time do you need?

17 MR. BRUCE: Well, however much time he is taking,  
18 your Honor.

19 THE COURT: My question was how much time do you  
20 need.

21 MR. BRUCE: Well, actually, Judge, I have got four  
22 clients, and I can ask them, and I will get a response in 14  
23 days.

24 No, Mr. Gravino is saying no.

25 THE COURT: We have got Easter.

1           MR. BRUCE: Yes, okay. Three weeks, Judge, I will  
2 get a response. We will get a client response.

3           So that's No. 20?

4           THE COURT: 28.

5           MR. BRUCE: 28, request to produce.

6           THE COURT: All right. Mr. Samore, anything else?

7           MR. SAMORE: Your Honor, one thing with respect to  
8 interrogatory -- we dealt with No. 25, and I appreciate  
9 counsel's response to Production Request No. 25, but I don't  
10 think that, again, he has identified any customers that  
11 complained, and if there were none that had any oral -- that  
12 would include verbal or written complaints. He hasn't  
13 identified any.

14           MR. BRUCE: Now, this is a moving target, Judge. We  
15 talked about this for 15 minutes. I have said in the court, I  
16 have said in my papers, there is all kinds of patients that  
17 have complained. I mean, there is all kinds of patients that  
18 are unhappy with this. He has asked for documents, and we  
19 talked about the HIPAA issue, and we are not -- we gave them  
20 all of the documents, which pursuant to your order were  
21 redacted. Now, it sounds like he wants to go back and revisit  
22 this and get us to give you the names of our patients that are  
23 not a party to this suit. We have already talked about this.  
24 I'm not giving them the names of my patients.

25           THE COURT: Can you redact them?

1           MR. BRUCE: He has them. He has all of the  
2 patients -- he has every scintilla of medical records of each  
3 of my four plaintiffs who are the ones that are the doctors.  
4 He has each of those medical records of every patient and  
5 every photograph of the PicoSure machine. He has got that.

6           Now he is switching gears. He is unhappy with the  
7 last response about he doesn't have any documents about  
8 complaint. Now he is saying, "Well, Devon hasn't told me the  
9 patients that have complained." I can't tell him the names of  
10 the patients that have complained. You have already talked to  
11 me about -- I mean, we have talked about that in this  
12 courtroom.

13           MR. SAMORE: In your Judge's order, your Honor, it  
14 specifically authorizes the release of protected HIPAA  
15 information.

16           MR. BRUCE: And I gave it to him.

17           MR. SAMORE: But we don't have any of the names of  
18 the --

19           MR. BRUCE: This is the first that I'm hearing this.  
20 Now they want the names? I have got Mr. Samore saying, "We  
21 don't need the names." I will go back and get the report of  
22 proceedings.

23           THE COURT: We had moved on, and now apparently we  
24 have backtracked.

25           MR. SAMORE: If you look at Interrogatory No. 14 --

1 THE COURT: Please don't interrupt.

2 So we have talked about Document Request No. 25. We  
3 had beaten that dead horse beyond belief.

4 Now the related interrogatories, having moved past  
5 Document Request 25, the related interrogatories are  
6 Interrogatory No. 14 and No. 15. No. 14 says: "Identify any  
7 and all customers who complained about the services they  
8 received from using the PicoSure product, and for each such  
9 customer, state the amount paid by the individual" --

10 MR. BRUCE: We have already ruled that out.

11 THE COURT: -- "for the service and the amount you  
12 subsequently refunded."

13 15 is: "Identify any and all individuals who have  
14 declined to use your tattoo removal services due to the  
15 alleged defects."

16 All right. Is there anything for 15?

17 MR. BRUCE: I think -- is that where he is  
18 saying -- asking me about people that didn't use it?

19 THE COURT: These are --

20 MR. BRUCE: Yes, that was the easy objection. That  
21 was on foundation. How will I know what we don't know, right?  
22 But now it seems like, orally, he is saying, "I want the names  
23 of the patients," and I have candidly -- you know, pursuant to  
24 your order and in discussion with Mr. Samore in this room, we  
25 haven't given them the names of the patients. I can't. I

1 cannot.

2 THE COURT: No. 14 says: "Identify any and all  
3 customers who complained about the services they received."  
4 Do you know any? Now, we are not talking about -- and that's  
5 why I started with customers being the person who comes in the  
6 door to have the tattoo removed, not the clients who purchased  
7 the product.

8 MR. BRUCE: Yes.

9 THE COURT: So do you have any of that?

10 MR. BRUCE: Do I --

11 THE COURT: Do you know of a human being who walked  
12 into one of your clients' offices and said, "Oh, my God, it is  
13 still here. Why?"

14 MR. BRUCE: Well, I would imagine that there are many  
15 of those. I believe that there are many of those.

16 THE COURT: Okay.

17 MR. BRUCE: Okay. Whether or not the doctors can  
18 identify them is one question, right --

19 THE COURT: Yes.

20 MR. BRUCE: -- without, you know, sitting down and  
21 looking at everything.

22 And the second thing is even if they get the name --

23 THE COURT: You mean physically can or legally can?

24 MR. BRUCE: No, I was getting to the second point.

25 THE COURT: One I can fix, the other I can't.



1 MR. BRUCE: That was my twirling of my finger.

2 THE COURT: Okay.

3 MR. BRUCE: The second point is I can't give them the  
4 names of that, and so we can put a number next to it, an A or  
5 B or C, whatever, if they know a specific patient, assuming  
6 that, but that's what I put, violation of HIPAA.

7 And now we are getting pretty far afield, Judge, on  
8 the allegations in this complaint, but that's okay.

9 THE COURT: How? I mean, my understanding of the  
10 whole complaint is your clients bought a product that didn't  
11 do what it was supposed to do, and I would think they would  
12 learn that because their customers came in and said, "My  
13 butterfly is still here, and it is supposed to be gone."

14 MR. BRUCE: That's right, that they saw that this is  
15 what happened. I'm just keeping everyone focused that here is  
16 the plaintiff here, who is the purchaser of the thing that  
17 doesn't work, and then we have some people over here, right,  
18 that these people can see that this thing is not working here,  
19 and they have the evidence of that because they have all of  
20 those people's records.

21 THE COURT: Right. But the people over on your left,  
22 my right, who have the tattoo, if they are complaining about  
23 "I'm giving you \$200 to get rid of my tattoo; my tattoo is  
24 still here," doesn't that sound -- isn't that pretty relevant  
25 to your case?

1 MR. BRUCE: Sure, yes.

2 THE COURT: Okay. And so that's why they want to  
3 know who that person is.

4 MR. BRUCE: I can't give them the name.

5 THE COURT: Why?

6 MR. BRUCE: HIPAA.

7 THE COURT: I already took care of that at the last  
8 hearing.

9 MR. BRUCE: No, no. Judge, I'm pretty clear. I will  
10 go back and dig up the proceedings. I thought I suggested,  
11 and Mr. Samore agreed, we are not getting into the names.

12 THE COURT: I will have to go back and look. The  
13 transcript says what it says.

14 MR. BRUCE: Okay. Yes, I don't want to walk away  
15 with everybody thinking ill of me. Those medical records, the  
16 4,000 pages that I have given to them on the four plaintiffs,  
17 that is HIPAA-protected material.

18 THE COURT: Uh-huh.

19 MR. BRUCE: Okay. I mean, I just want to give -- I  
20 have given -- I understand your ruling. I couldn't give those  
21 without your order. But there was a discussion, I believe,  
22 about the names, the actual names of these people.

23 THE COURT: I will find out. I will have to check.

24 MR. BRUCE: And if I'm mistaken, I will stand  
25 corrected, but my understanding of the law is I can't give

1     them the names of a nonparty under HIPAA. We can go back and  
2     look at the transcript.

3             MR. SAMORE: One solution might be to identify them  
4     the way they did by pointing to a record and saying -- or  
5     referring to Patient A or Patient B. He says -- on the one  
6     hand, he says there is tons of people who have complained  
7     about the product. He says there are tons of other customers  
8     unhappy. On the other hand, he has identified only one person  
9     that sent a text message, which he never provided to us.

10            THE COURT: I have already ordered him to do it.  
11     Look, when I make a ruling and move on, I try to keep going.  
12     That's why it gets a little frustrating when we are  
13     backtracking because we have talked about this. I'm not  
14     making a decision until I read a transcript of what I decided  
15     about it. So I am going to read it. We will figure out 14  
16     and 15. Let's move beyond 28 now.

17            MR. SAMORE: The interrogatories, No. 6, 7, and 10.

18            THE COURT: Okay. 7 and 8, okay. I have got 6, 7,  
19     and 8, but okay.

20            MR. SAMORE: They deal with investigations or  
21     disciplinary actions by any board or professional association.

22            THE COURT: Right, right.

23            MR. SAMORE: Okay. And this is -- these are  
24     relevant. There could be an administrative or investigative  
25     proceeding with respect to the competency of plaintiffs in

1    their medical practice.  There could be investigations or  
2    disciplinary actions relating to their truth or falsity.

3               Your Honor has already ruled that whether they used  
4    the product properly is relevant, and you ordered production  
5    of records pertaining to whether they properly used the  
6    machine.

7               THE COURT:  What if the criminal proceeding was  
8    dismissed or disciplinary complaint was dismissed or it was  
9    unfounded?  Civil investigations, proceedings, if they were  
10   found unfounded, do those need to be produced?

11              MR. SAMORE:  Well, the scope of -- it may not be  
12   admissible, but I think the scope of discovery -- I mean, it  
13   is not -- they are not claiming it is too burdensome.  I think  
14   that it should be produced, yes.

15              THE COURT:  All right.  Why would it be relevant if  
16   there is -- if they are saying there was a complaint -- I will  
17   use the Illinois version because I don't know where all the  
18   other plaintiffs are.  Let's say there was a complaint to the  
19   Illinois Department of Financial and Professional Regulation,  
20   and they investigated about one of the plaintiffs and it is  
21   unfounded.  How is that relevant?

22              MR. SAMORE:  If they made a specific, you know,  
23   finding that the allegations were unfounded, then I would  
24   agree with you, but oftentimes that could lead -- end in a  
25   more ambiguous --

1 THE COURT: That's why I started it with "unfounded,"  
2 okay?

3 MR. SAMORE: Okay.

4 THE COURT: So if they are unfounded, do you need  
5 them? They don't seem relevant to me.

6 MR. SAMORE: No, your Honor.

7 THE COURT: Okay. Any criminal. So I assume you  
8 don't need traffic tickets, parking tickets, things like that,  
9 ordinance violations.

10 MR. SAMORE: That's true.

11 THE COURT: Okay. How about bankruptcies? How would  
12 those be relevant?

13 MR. SAMORE: I don't -- I agree with you.

14 THE COURT: Okay. So, Mr. Bruce, it sounds like any  
15 criminal convictions, that was produced.

16 MR. BRUCE: Yes -- well, again, I answered that  
17 question in the interrogatories for each one.

18 THE COURT: Right. And that information was  
19 provided, if there was any --

20 MR. BRUCE: Yes, I amended the answer.

21 THE COURT: Okay.

22 MR. BRUCE: Let me put this in context, Judge. What  
23 they are doing is they are going on a fishing expedition for  
24 dirt in a case where these people were unhappy with the  
25 machine, and they say that it is falsely advertised, and they

1 want the difference in their money back. That's what this  
2 case is.

3 Now, they have asked about -- in about four  
4 different -- and the reason why he didn't cite them is because  
5 I answered all these for every one. They are asking if any of  
6 these people have a financial relationship with me,  
7 personally, whether my law firm, whether John Holevas has any  
8 financial relationship with any of these people, and they went  
9 on and on and on. They asked all these things, trying to dig  
10 up dirt, and I answered all those financial questions, and the  
11 answer is none, none, none, and none, okay?

12 Okay. So then they asked about -- they want to know  
13 about administrative hearings, board associations. Judge,  
14 look, there has to be a point. So then not familiar with this  
15 type of inquiry, I looked at his case law that he cited. He  
16 cites one case, Redman vs. RadioShack, which I have cited to  
17 extensively in our response brief, and what that had to do  
18 with, that had to do with the fact about whether or not there  
19 was an undue influence due to the motives of the named  
20 plaintiff who was employed by the class counsel's former law  
21 firm, okay? They are going far afield.

22 They have no authority to start crawling into these  
23 people's backgrounds ad nauseum to try and chase these people  
24 away and dig up irrelevant dirt. That's what they are trying  
25 to do. They want to dig up their lives and say, "Well, we are

1 not interested in pursuing this class action," and they don't  
2 have any authority to do it, even though I think all this  
3 stuff is beyond the realm. I have told them all about the  
4 financial stuff. I have told them about whether or not these  
5 people have any felonies or convictions. I have told them  
6 about whether they have been a participant in any other class  
7 action, which, of course, all of these answers are no.

8 And at some point -- and now he's -- I asked  
9 him -- when I asked him under this Rule 37, Mr. Samore said he  
10 wouldn't negotiate. He didn't want to amend any of his  
11 answers. That's what the man said. And so it was a short  
12 conversation because I said, "Eric, I don't want to waste your  
13 time. Are you going to amend any of these?

14 "No."

15 And so now, like many of the other things we are up  
16 here for, now you asked him a simple question, "Why do you  
17 need them?

18 "Oh, I guess I don't. I guess I don't.

19 "Well, why, if they are unfounded, do you need them?"

20 I mean, what do they want, Judge, that we, by law,  
21 are required to give to them? I don't think there is  
22 anything. I have told them about felonies, financial stature,  
23 class actions. I don't think any of them have bankruptcies.  
24 So they are probably not -- he is not entitled to know that.

25 THE COURT: Well, he just said he doesn't need them.

1 MR. BRUCE: I mean, what's the professional --

2 THE COURT: Good stuff comes out of the south  
3 sometimes. Tennessee, there is a lot of bourbon from there.  
4 Meyer vs. Prudential Insurance Company, 581 F.2d. 904,  
5 Page 913: "Much of discovery is a fishing expedition of  
6 sorts, but the Federal Rules of Civil Procedure allow the  
7 courts to determine the pond, the type of lure, and how long  
8 the parties can leave their lines in the water."

9 MR. BRUCE: I like that.

10 THE COURT: So I have got to figure this out. So  
11 that's why I go with the basic things about, okay, unfounded;  
12 not going to get, not entitled to bankruptcies; not going to  
13 get, not entitled to criminal convictions within ten years,  
14 absolutely. Criminal convictions relating to honesty, yes,  
15 all that stuff that is impeachable under 609. Sure, that's  
16 fair game.

17 So then I will drill down. Disciplinary proceedings,  
18 say there is a disciplinary proceeding again by the Illinois  
19 Department of Financial and Professional Regulation, and in  
20 that proceeding, they find that one of the doctors is not  
21 credible or committed perjury in some kind of way. Yes, that  
22 would be good cross-examination. Is it burdensome? I don't  
23 know because I don't know how --

24 MR. BRUCE: I haven't claimed -- I haven't claimed  
25 burdensome. I'm claiming relevance.



1           THE COURT: I am just going through, in my head, why  
2 something like that would not be discoverable.

3           MR. BRUCE: Let's build on that because it seems  
4 like -- he has got something he is after, and I don't know  
5 what it is. So we are narrowing it down to disciplinary  
6 proceedings. So let's say we represent these doctors, and  
7 Dr. -- I'm giving a hypothetical for the record. It is not  
8 the case that I know at all. But let's say Dr. Burke out in  
9 Delaware has got some -- you know, he is a physician. He does  
10 a lot of different medical procedures. Let's say there was a  
11 complaining patient about something, and it had nothing to  
12 do -- I mean, it has nothing to do with any of these issues.  
13 So now are we going to crawl into that, Judge?

14           THE COURT: Well, that's why I'm talking about the  
15 pond and the lure because every doctor is going to have a  
16 medical malpractice case. There is not a doctor alive that  
17 doesn't have a medical malpractice. So I'm trying to limit  
18 the scope to figure out where this goes.

19           MR. BRUCE: And to that point, Judge, as a person who  
20 practices a lot of medical mal cases, I know that a lot of my  
21 cases end up in the IDPR, right? So, I mean -- so you bring  
22 up a good point, which is -- I hadn't even thought of that,  
23 but to the extent that they have had ten malpractice cases  
24 filed against them, which all has to do with negligence,  
25 right, these are negligence cases about whether or not they

1 deviated from the standard of care. You know, half of those  
2 may have some reporting to the IDPR. But what does that have  
3 to do with buying a machine that they lied, because it says  
4 photoshopped, and it doesn't say photoshopped, and the tattoo  
5 is here, and then it is not here. I mean, what does that have  
6 to do --

7 THE COURT: And if it is a medical malpractice case,  
8 it has nothing to do with it. But if it is a disciplinary  
9 proceeding where they were distributing prescriptions  
10 improperly and covering it up, yes. Does it exist? Probably  
11 not, because it is probably a criminal conviction that goes to  
12 it. I just don't know. And most of this stuff -- how many  
13 plaintiffs are we talking about here?

14 MR. BRUCE: Four today, but there might be more.

15 THE COURT: Okay. So you have got four. All of that  
16 stuff is online. It is almost summertime. You have got to  
17 have summer associates coming into your firm. Aren't they  
18 going to be online, digging around? It is all online. If  
19 there is something out there, they will find it.

20 MR. BRUCE: Can we --

21 THE COURT: I just don't -- criminal convictions,  
22 that has been produced. If there are -- I'm limiting it to  
23 ten years, civil disciplinary proceedings -- or a civil  
24 proceeding or a disciplinary proceeding in which  
25 untruthfulness was found. So you can ask your clients. That

1     shouldn't take much time. If they exist, that's fair game.

2     That's good cross-examination. That goes to bias and that

3     kind of stuff.

4             MR. SAMORE: All right.

5             MR. BRUCE: And if there is not, if it doesn't fall

6     under the definition you just said, we are just saying none?

7             THE COURT: Right.

8             MR. BRUCE: All right.

9             THE COURT: All right. Mr. Samore, what do you got  
10    next?

11            MR. SAMORE: Well, you know --

12            MR. BRUCE: We had a number that I wanted to raise  
13    with you.

14            MR. SAMORE: Let me finish.

15            THE COURT: Let him finish.

16            MR. SAMORE: I'm not finished.

17            Conversations with Cynosure representatives.

18            THE COURT: Okay. Give me a number.

19            MR. SAMORE: I'm referring to No. 18.

20            THE COURT: 18. I thought we talked about that, but  
21    shoot. Go ahead.

22            MR. SAMORE: That's supporting allegations that  
23    Cynosure knew that its representations were false.

24            THE COURT: Yep. We had that big -- that was the  
25    attorney-client privilege.

1 MR. SAMORE: Well --

2 MS. LONG: Sorry, it is confusing, Request For  
3 Production 18 and Interrogatory 18, which are actually  
4 different things.

5 THE COURT: Okay.

6 MS. LONG: So we already talked about the putative  
7 class members.

8 THE COURT: Okay.

9 MS. LONG: This is about Plaintiffs' staff members.

10 MR. SAMORE: Okay. What they -- and this production  
11 motion is limited to two plaintiffs.

12 THE COURT: Are we talking about production or  
13 interrogatories?

14 MR. SAMORE: This discovery request involves  
15 Interrogatory No. 18, and it is with respect to two of the  
16 responses.

17 THE COURT: Okay.

18 MR. SAMORE: With respect to Hatchet, Plaintiff  
19 answered that Cynosure's agents informed Plaintiff's staff  
20 members on multiple occasions that the PicoSure machine would  
21 not remove or eliminate tattoos. We asked for -- we want to  
22 know, okay, if this happened, what staff members were told  
23 this, what Cynosure agents were told this.

24 THE COURT: Let me make sure I have the right one.  
25 My Interrogatory 18 for the Defendants says: "Identify any

1 and all bases for your allegations that Cynosure 'knew' or was  
2 'aware' misrepresentations regarding PicoSure products were  
3 false." Is that the interrogatory we are talking about?

4 MR. SAMORE: Yes, your Honor.

5 THE COURT: Okay. So now you lost me here. So what  
6 are we talking about?

7 MS. LONG: In their response --

8 THE COURT: Okay.

9 MS. LONG: -- they say they object because it calls  
10 for a narrative answer, and then they say that Cynosure's  
11 agents and/or representatives informed Plaintiff's staff  
12 members on multiple occasions.

13 THE COURT: Okay.

14 MS. LONG: Da, da, da.

15 They, after we pushed them, finally revealed the  
16 Cynosure representatives that they have talked about or that  
17 they are referencing in that response, but they still -- they  
18 say that these Cynosure agents spoke to Plaintiff's staff, and  
19 we have asked repeatedly for identification who on Plaintiff's  
20 staff that was and have yet to get a response.

21 MR. BRUCE: I have no idea what they are talking  
22 about, Judge.

23 MS. LONG: Okay. So it is on Docket 105-5. So it is  
24 Page 7 of Exhibit E to our motion.

25 MR. BRUCE: What plaintiff?

1 THE COURT: Hold on. Hold on. Hold on.

2 MS. LONG: This is Hatchet.

3 THE COURT: Hold on. Wait, wait, wait.

4 MS. LONG: Sorry.

5 THE COURT: All right. 105-5, tell me what page  
6 number.

7 MS. LONG: It is Page 10 of 69.

8 THE COURT: All right. Hold on.

9 All right. I'm with you, Ms. Long. Which number,  
10 18? Okay. Give me a second.

11 Yes, okay.

12 Okay. Mine says -- mine identifies the three  
13 Cynosure representatives.

14 MS. LONG: Yes.

15 THE COURT: Brice, Carnie, and Kaufman.

16 MS. LONG: But it doesn't identify the names of the  
17 Plaintiff's staff members.

18 THE COURT: Okay. All right. Do you know the  
19 names -- do you see where we are, Mr. Bruce?

20 MR. BRUCE: Now I find it. They never told me that  
21 that's what they wanted to know. They complained, and I gave  
22 them the name of the Cynosure class. Now they are  
23 asking -- first of all, I have no idea if my Plaintiffs -- who  
24 said that to them, but that's not -- I mean, I wish Mr. -- I  
25 really wish Mr. Samore had told me that's what he was after.

1     So I'm not going to represent to the court. I understand. He  
2     is saying --

3             THE COURT: How about three weeks to get an answer to  
4     that, if they know, if they remember?

5             MR. BRUCE: But I want to be clear so I don't do  
6     anything wrong. It is which of the -- it is  
7     Plaintiff -- which one?

8             MR. SAMORE: It is Hatchet and Ritacca.

9             MR. BRUCE: We want to ask Dr. Ritacca --

10            MR. SAMORE: And Dr. Hatchet.

11            THE COURT: Who on their staff talked to Brice,  
12     Carnie, and Kaufman.

13            MR. BRUCE: Who on staff --

14            THE COURT: And complained about those --

15            MR. BRUCE: If they remember. Fair enough. Got it,  
16     Judge.

17            THE COURT: Okay.

18            MR. BRUCE: I thought they were complaining about the  
19     names of the Cynosure reps, which we gave them.

20            THE COURT: You gave those three names. They want to  
21     know who the other part of this conversation was. They want  
22     foundation.

23            MR. BRUCE: Got it.

24            MR. SAMORE: I just want to say, for the record, if  
25     you also look at Document 105-2, Page --

1 THE COURT: Hold on. Hold on.

2 Okay. 105-2. What page?

3 MS. LONG: Page 5.

4 MR. SAMORE: Page 5.

5 THE COURT: Page 5 of 8?

6 MR. SAMORE: Okay. Under Paragraph No. 9, we asked  
7 specifically for them to identify the members of Plaintiff's  
8 staff referred to.

9 THE COURT: Okay. Well, now he is going to do it.

10 MR. SAMORE: Okay. Thank you.

11 THE COURT: Problem solved.

12 MR. SAMORE: Okay.

13 THE COURT: Okay. What's the next one?

14 MR. SAMORE: Then we have our motion to compel, and I  
15 think this will be very short, evidence relevant to direct  
16 damages.

17 MR. BRUCE: Oh, no, Judge, we are not done with my  
18 motion to compel.

19 MR. SAMORE: Well, we filed a motion to compel  
20 evidence related to direct damages, that is evidence regarding  
21 revenues obtained from the PicoSure machines.

22 THE COURT: All right. Before we get into that, I'm  
23 going to turn back to Mr. Bruce, and we are going to go  
24 through and see what other, if any, remaining issues exist.

25 MR. BRUCE: And, Judge, if I cite something you ruled



1 on, just chastise me.

2 THE COURT: Okay.

3 MR. BRUCE: All right. So I'm going to start. I'm  
4 just going to flip through my motion to compel, so you know  
5 where I'm at, because when I did it, I cited both what I asked  
6 for and what they responded. Do you follow me?

7 THE COURT: Okay.

8 MR. BRUCE: So I'm on Page 5. I didn't hear you talk  
9 about --

10 THE COURT: Just tell me the production request and  
11 the number.

12 MR. BRUCE: Third Request for Production, No. 2.

13 THE COURT: Got you.

14 MR. BRUCE: Studies, research, or data, and I cited  
15 you both the BASF case and Matrixx case.

16 THE COURT: Okay.

17 MR. BRUCE: I say the machine doesn't work. They say  
18 the machine does work, despite what they told the FDA. That's  
19 their contention, at least currently. I am entitled to know  
20 anything in their possession, and they are all saying, "Well,  
21 it is voluminous," whatever.

22 THE COURT: I understand that, and I think the terms  
23 "study, research, and data" are not vague or confusing. It is  
24 amazing how some of the smartest people in this country, who  
25 spent at least seven years going to school, don't know what

1 study, research -- don't know what -- we know what those mean.

2 But my notes reflect and my recollection is they said  
3 that they are not withholding any documents on that.

4 MS. LONG: That's correct.

5 THE COURT: Okay. That was one of the ones that I  
6 had under the resolved category. And everybody is on notice,  
7 right? Everybody knows where we are going with this thing.

8 MR. BRUCE: Okay. Judge, interrogatory -- same Third  
9 Request For Production, No. 3.

10 THE COURT: Okay.

11 MR. BRUCE: They not only asked, they re-asked, sent  
12 me e-mails. You said, to quote the esteemed Judge Johnston,  
13 "What is good for the goose is good for the gander." That's  
14 citing Judge Johnston. They have bugged me to death about the  
15 names of all the other PicoSure -- or all the other  
16 tattoo-lightening machines that my clients have purchased, and  
17 they not only want the name, they want the model number, and  
18 they have been bugging me about the price, which we gave them.  
19 So that's what we want.

20 MS. LONG: I'm sorry?

21 MR. BRUCE: Interrogatory No. 3.

22 MS. LONG: Interrogatory No. 3?

23 MR. BRUCE: "What price did Defendant charge for the  
24 Revlite product that was used in the FDA clinical test to  
25 compare with the PicoSure?"

1 MS. LONG: Price or price range. We gave them a  
2 price range.

3 MR. SAMORE: I think we complied with that  
4 interrogatory.

5 MR. BRUCE: Okay. The range they gave us was 50,000  
6 to 175,000. It is a broad range. I will go back and ask for  
7 the price. That's fine.

8 THE COURT: Yes, they gave the range.

9 MR. BRUCE: It is on me to be more specific.

10 THE COURT: They gave the range. Okay.

11 MR. BRUCE: I think you addressed -- I'm at the  
12 Fourth Set of Production now, No. 2.

13 THE COURT: Yes. No. 2, okay.

14 MR. BRUCE: We talked about they have got statements  
15 of the Plaintiffs. I mean, the website -- okay, Mr. Gravino  
16 is whispering you granted that.

17 THE COURT: Okay.

18 MR. BRUCE: Now, what hasn't been discussed  
19 is -- referred to, but not discussed -- is Fifth Set of  
20 Request to Produce Documents.

21 THE COURT: Fifth set? Hold on one second. Fifth  
22 set, request to produce, go ahead.

23 MR. BRUCE: Yes, No. 1.

24 THE COURT: Which number?

25 MR. BRUCE: No. 1.

1 THE COURT: Okay.

2 MR. BRUCE: Counsel has candidly admitted there is a  
3 client file for each of these PicoSure people, and we want it.  
4 We want the contracts. You have already ordered. We are  
5 going to talk to them about the e-mails, unless it is just in  
6 a file, which she said, I thought -- we can go back and read  
7 the transcript -- electronic and written, I thought I heard,  
8 which would be really easy to produce and just send it to a  
9 copy service at my expense. So I don't know that we have to  
10 get into a whole e-mail search if they have got e-mails that  
11 are in the customers files' and correspondence with each  
12 purchase of the PicoSure product.

13 MS. LONG: I would just like to say that my use of  
14 the word "file," I think counsel is reading a lot into that  
15 and assuming that he knows what's in the file, and I don't  
16 even know what's in the file. So I couldn't possibly have  
17 been saying that.

18 THE COURT: Okay. Well, I was just going to ask you  
19 what is a client file. Do we know what a client file is?

20 MS. LONG: I am fairly confident that it is not  
21 comprehensive communication. Every time a customer e-mails,  
22 that e-mail does not go into the file. I can't say that with  
23 a hundred percent certainty, but based on my conversations.  
24 That file would be huge because, again, after we sell a laser,  
25 the relationship is ongoing with clinical, with regulatory,

1 with finance sometimes if there is questions about their  
2 payments of the laser.

3 THE COURT: And I agree it could be huge. It could  
4 be massive.

5 MS. LONG: And I do not believe that they are all  
6 stored in that file.

7 THE COURT: But if it is a client file, then it will  
8 be Client X, and it is a file. It may be huge, but it is easy  
9 to produce.

10 MS. LONG: I'm almost positive that that's not true,  
11 but I can confirm.

12 THE COURT: I don't know.

13 MR. BRUCE: They said they pulled the files. That's  
14 what she said several times.

15 MS. LONG: That the contract was in. I said that  
16 there is a file that contains a contract. I never said there  
17 is a file that contains every single thing.

18 THE COURT: Find out if there is something that we  
19 are referring to as "client file." If there is a file for  
20 every customer that has the contract, the invoices,  
21 communications back and forth, anything related to that  
22 customer, if there is a client file or a file that has -- or  
23 maybe it is a customer file that has all of that, it might be  
24 massive.

25 MS. LONG: I will confirm that, but I'm --

1           THE COURT: But it would certainly be responsive to  
2 all kinds of these requests and easy to produce.

3           MS. LONG: Yes, I'm almost positive that that's not  
4 the case, and I just want to make sure that I'm being clear,  
5 because counsel has intimated a couple of times that I said  
6 that, and I never said that.

7           THE COURT: Find out. And if we have an issue, we  
8 can always have an evidentiary hearing. We can have witnesses  
9 testify about things.

10          MR. BRUCE: Yes, Judge, and to put a finer point, I  
11 may, depending on what their response is, be asking, you know,  
12 before we get too much further, for the 206 witness with the  
13 most knowledge of that record retention of the client files,  
14 because I can't imagine that it is not what she said earlier,  
15 that there is a client file to pull, and I would like to ask  
16 somebody under oath who has the most knowledge about that, if  
17 they come back and say, "We don't have it," that way. I don't  
18 want to play games.

19          THE COURT: You can always take a 30(b)(6)  
20 representative deposition on document retention.

21          MR. BRUCE: Great. Thanks, Judge.

22          THE COURT: That's always within the scope.

23          MR. BRUCE: Sixth Request For Production, No. 1.

24          THE COURT: Yes.

25          MR. BRUCE: The same thing, Judge. It is their

1 client file.

2 THE COURT: All right. Hold on one second here.

3 This is about complaints, problems -- complaints,  
4 problems, and concerns regarding maintenance issues.

5 MR. BRUCE: And they say they are going to supplement  
6 or amend at the bottom.

7 MS. LONG: We say we reserve our right if anything  
8 new comes up. We are not withholding based on that.

9 THE COURT: Okay. And that's what I'm saying. Is  
10 there anything that is being withheld, or are you -- this is  
11 an issue that you are saying you are producing the complaint  
12 log and nothing else?

13 MS. LONG: This is one where they are asking for  
14 literally all communications with any customer about anything  
15 ever. So if a customer writes --

16 THE COURT: No, it says about complaints, problems,  
17 or concerns.

18 MS. LONG: Including, but not limited to --

19 THE COURT: E-mails or communications about the --

20 MS. LONG: -- complaints, problems, or concerns. I  
21 think it is our position that those would all have been logged  
22 in the complaint log that we produced.

23 MR. BRUCE: Judge --

24 THE COURT: If you think it might be your position  
25 that -- I need something a little more definitive.

1 MR. BRUCE: Can we get an affidavit from somebody at  
2 Cynosure? Or I will take that records dep that you talked  
3 about. Judge, we have to get to the bottom of it. It doesn't  
4 sound like they have done anything to look for this stuff.

5 THE COURT: Okay. We will find out. We will find  
6 out. Okay.

7 So what's the next one, Mr. Bruce?

8 MR. BRUCE: Sixth Request For Production, No. 2.

9 THE COURT: Okay. Hold on. No. 2.

10 MR. BRUCE: Yes, and can I flesh this out, Judge?

11 THE COURT: Yes, go ahead.

12 MR. BRUCE: So here I'm asking for documents from the  
13 Defendant regarding other lawsuits or claims. So it is not  
14 simply a pleading in court, but if somebody is calling or  
15 writing and saying, "I want my money back, this thing doesn't  
16 work, I'm rejecting it, I'm rescinding it or suing, breach of  
17 contract," whatever. That is any of that.

18 They object, among other things, as attorney-client/  
19 work product privileges. Just so we are clear, I'm asking for  
20 people who are adverse to Cynosure, asking them for any claims  
21 or lawsuits, and I can't imagine how that's attorney-client or  
22 attorney work product.

23 THE COURT: Claims or lawsuits regarding the  
24 products, involving the machine, okay. So it is limited to  
25 that. But you don't need like in Title VII or an employment



1 or a slip-and-fall or anything like that.

2 You want if there is lawsuits -- again, we know what  
3 a lawsuit is -- involving the PicoSure machine. You want to  
4 see those.

5 Do those even exist?

6 MR. SAMORE: They don't.

7 MS. LONG: And there are no other lawsuits in the  
8 United States about the PicoSure machine.

9 THE COURT: How about outside the United States?

10 MS. LONG: I think -- it is our position that  
11 litigation outside the United States is not relevant to this  
12 issue of how we marketed the machine within the United States.  
13 The basis of this claim is a false marketing.

14 THE COURT: I disagree. I disagree. Are there other  
15 lawsuits outside the United States?

16 MR. SAMORE: I don't --

17 MS. LONG: No, there is one, Melbourne. There is  
18 one. We can produce the pleadings from that. Obviously, this  
19 is where it comes up with privilege. There is one piece of  
20 litigation. So we will produce the pleadings.

21 THE COURT: Produce the pleadings.

22 MS. LONG: Okay. The publicly available docket  
23 information regarding it, We will produce that.

24 THE COURT: Produce the pleadings.

25 MR. BRUCE: And, Judge, what about --

1 THE COURT: And then claim.

2 MR. BRUCE: Right.

3 THE COURT: So if you call up an insurance -- if you  
4 get in a dispute with your neighbor or something, and you end  
5 up calling an insurance rep, that's a claim under a policy or  
6 something like that. And it is more than just a complaint.  
7 We have talked about complaints. We have got that covered.

8 A claim, so if somebody hasn't filed a lawsuit, but  
9 called and threatened and said, "I want my money back," do  
10 those exist?

11 MS. LONG: We produced the one -- I am aware of one  
12 incident of that, and we produced the letter that we received.

13 THE COURT: Okay. All right.

14 MR. BRUCE: Is that inside or outside the United  
15 States?

16 MS. LONG: That's inside the United States. I don't  
17 think -- I am not aware of claims outside the United States.  
18 I think that that gets a bit farfetched.

19 THE COURT: Well, if they exist, produce them.

20 MR. BRUCE: Judge, Request to Produce No. 3, the same  
21 set, in this one, we are asking -- I will give you the context  
22 and maybe we can expedite this.

23 Because of the very, what we think, is damning  
24 evidence for them when they told the FDA it doesn't do what  
25 the photographs depicted that it does, which is clearly what

1 the FDA documents that they submitted said, then that got my  
2 interest, and I'm asking for any documents, e-mails,  
3 correspondence, communications with any governmental agency  
4 regarding the PicoSure product.

5           What we are looking for there is if they told the FDA  
6 that, what did they tell the Aussies, what did they tell the  
7 Canadians, what did they tell the State of California, what  
8 did they tell these other governmental agencies. And instead  
9 of giving all this boilerplate, if the answer is just "No,  
10 that's it," then that's fine. I mean, "None other than the  
11 FDA ones previously produced," that's fine. But they give me  
12 this whole list thing, and now I'm thinking, well, they told  
13 other governments, and maybe they told them the same thing or  
14 maybe they told them something different. I won't know until  
15 they give it to me.

16           THE COURT: Okay. It seems a little broad, but go  
17 ahead. It seems like there is something that should be  
18 provided, but they are asking for a lot. So tell me what your  
19 position is.

20           MS. LONG: I think a lot of that is going to be  
21 redundant. I would have to discuss it with my client. But to  
22 the extent that we have talked to any governmental agency  
23 about registering our business office so that we can sell the  
24 PicoSure, you know, getting a business license, maintaining a  
25 business license --

1 MR. SAMORE: Yes, this is --

2 THE COURT: Right. And I agree. That's why I think  
3 it is broad. But I understand if there is representations  
4 that were made similar to the FDA, then it seems relevant.

5 MR. BRUCE: I will limit it in any way, Judge, you  
6 deem fit. We know what we are after. We are talking about  
7 the efficacy, of the effectiveness of this product, which they  
8 already -- you know, I mean, again, I think they cited a bunch  
9 of studies, which we have never seen in the FDA documents.  
10 But they have said they have given them, so I will go back and  
11 look. I'm sure I may have missed them. But they might cite  
12 other studies to the Aussies or the Canadians or whatever. So  
13 I would limit it to the effectiveness, efficacy of the  
14 PicoSure product. How is that, Judge?

15 MR. SAMORE: Your Honor, this is -- the FDA  
16 materials, this -- there was absolutely no misrepresentation.  
17 This is really a -- the whole suit is really --

18 MS. LONG: This is a death by a thousand paper cuts  
19 at this point.

20 MR. SAMORE: What they are trying to do is simply  
21 kill us with the production requests and time to respond to  
22 material. It is like having the same witness during trial  
23 come on and talk about the same topic. We have produced the  
24 information to the relevant, germane authority in the United  
25 States. That should be sufficient.

1           THE COURT: Look, if you are selling the product in  
2 Australia or the UK, and you tell those government bodies  
3 "This product does exactly what we say it is going to do" or  
4 "doesn't do what we say it is going to do," either way, that  
5 seems highly relevant. If they don't exist, they don't exist.  
6 But if you are making a representation to a government body  
7 that regulates your client's product in some way, and you say  
8 that it does everything it is supposed to do, as we understand  
9 the term, well, that's helpful for you, and I think you would  
10 want to produce it. If it says the contrary, well, then, it  
11 is relevant, and it goes to them, and you have got to deal  
12 with it. Now, if they don't exist, they don't exist. But if  
13 there are studies, and they are limited to any studies cited  
14 to any government agency regarding the efficacy of the  
15 PicoSure, that's what I limit it to, and I limit it to 2011.

16           MR. BRUCE: Thank you, your Honor.

17           MR. GRAVINO: Limit it to? What was that, your  
18 Honor, to the year --

19           THE COURT: 2011.

20           MR. BRUCE: You mean 2011 to the present?

21           THE COURT: Correct, yes, 2011 going forward.

22           MR. BRUCE: Did you -- I don't think so, but I could  
23 be wrong. Did you rule on Plaintiffs' Sixth Request For  
24 Production, No. 7 and 8, Judge? You ruled on 9 and 10. Did  
25 you rule on 7 and 8, and I just missed it?

1           THE COURT: 7 and 8, that's another one where the  
2 Defendant said that they are not withholding any documents.

3           MR. BRUCE: They formally made that representation.  
4 That's fine.

5           THE COURT: Correct.

6           MR. BRUCE: 14, Judge, did you rule on that one,  
7 software update? On that, you ruled?

8           THE COURT: Yes, and that's another one where they  
9 say they are not withholding any documents.

10          MR. BRUCE: Okay. 15 and 16, Judge?

11          THE COURT: Yes, also saying they are not withholding  
12 any documents.

13          MR. BRUCE: All right. 19?

14          THE COURT: Not withholding any documents.

15          MR. BRUCE: And I'm sorry, Judge, I should have taken  
16 better notes. I'm sorry.

17          THE COURT: That's all right.

18          MR. BRUCE: Did you rule on 22?

19          THE COURT: Yes, not withholding any documents.

20          MR. BRUCE: Oh, 26, did you get to that one, Judge?  
21 That's important.

22          THE COURT: I did not. I did not.

23          MR. BRUCE: Okay. So let me give you some context,  
24 Judge.

25          THE COURT: I did not talk about 26, yes, because I

1 have a big "no" next to it. So tell me why you need it.

2 MR. BRUCE: Oh, okay. Well, I think by the time I  
3 finish --

4 THE COURT: So give me a good pitch.

5 MR. BRUCE: Well, I will.

6 Judge, look, so as we peel back the onion, as I  
7 understand it, Cynosure was selling this \$300,000 thing that  
8 they photoshopped the tattoos about, and let's say, you know,  
9 the other machines that were on the market at the time were,  
10 let's just say, 50 grand, hypothetically.

11 Now, apparently what they did is that they worked  
12 with a finance entity. I don't know the relationship, which  
13 is why we are asking for this. And they set up these people  
14 to buy this. They said, "Oh, no, no, no. You don't have the  
15 money? We will help you." And they had these very complex  
16 agreements with the -- between Cynosure -- and this is all  
17 upon information and belief; I'm just learning about  
18 this -- between Cynosure, the finance entity, and then the  
19 prospective buyer because they can't pay the 300 grand.

20 So I want to peel back that onion, and as I'm  
21 starting to learn more about this, Judge, you may see another  
22 or they may see another round of discovery because I don't  
23 know if they have been rather specific in their answers about  
24 who the purchasers of this machine are. There may be a whole  
25 other bunch of people who got leaseback agreements, got lease

1 agreements, got loan-to-buy agreements, and if they have been  
2 narrowly tailoring their answers to myself and this court, we  
3 may be -- you know, there may be more people out there. I  
4 don't know. I'm not saying that. I'm not representing that.  
5 But I do know that several people have, I believe -- I  
6 believe, upon information and belief -- were directed to some  
7 other financial entity which has a relationship with Cynosure.  
8 So I want to get that information.

9 THE COURT: How is it relevant to your claims? It  
10 certainly might be -- you might be able to -- I don't want to  
11 use the word "spin." You might be able to convey that, and  
12 you might be able to make it sound nefarious and all of that  
13 to a jury. But as to the relevance of the claims, even under  
14 the broad scope of relevance in discovery, how is it relevant?

15 MR. BRUCE: Yes, so two ways. First of all, there  
16 might be a whole world of other class members that I don't  
17 know about, that you don't know about today, number one, okay?  
18 So number one.

19 Number two, which have knowledge about the  
20 complaints, which they have gotten complaints from those other  
21 people, which we would use, right, in the course of this case  
22 to prove that the machine doesn't work. I think that's  
23 probably one of them.

24 And second of all, Judge --

25 THE COURT: Well, you are getting the 450 contracts,



1 so you are going to know who they are.

2 MR. BRUCE: No, that's the point, Judge. That's the  
3 point. Do they have a whole different series of people that  
4 they have some loosey-goosey lease arrangement, who got the  
5 PicoSure machine? That's what I'm trying to find out, Judge,  
6 are there people -- maybe Mr. Samore would just tell us. Are  
7 there people, other than purchasers, that Cynosure has that,  
8 through some financial arrangement, ultimately obtained the  
9 PicoSure machines from them? Because I want to know about  
10 their complaints. I want to know about what representations  
11 they made to those people and so on.

12 But more to the point, Judge, in terms of once they  
13 say -- if I'm correct -- and maybe they will come back and  
14 say, "Devon, there is no third-party company," and the  
15 discussion will end. But let's just say there is Johnson  
16 Financing Company. Well, Judge, I will throw a subpoena on  
17 Johnson Financing Company and ask for "any and all complaints  
18 that you have received from your clients concerning the use,  
19 efficacy of this machine," because if I'm some poor  
20 dermatologist starting off in Oregon, and they fix me up with  
21 some finance company that they have got a relationship, and  
22 the thing doesn't work, and I'm losing my money, and I had to  
23 pay 300 grand for this, I'm sure as hell going to complain to  
24 these people and say, "This thing doesn't work that you guys  
25 got me this money for," right? And you say, "Well, it is not

1    there."   Well, I don't know, but we will find out as soon as  
2    they tell me the name of the company.

3               THE COURT:   Well, when you get financing, it is just  
4    somebody floating you a loan to buy the product.   You still  
5    have a contract and agreement with the person selling it to  
6    you.

7               MR. BRUCE:   It is unclear to me what this arrangement  
8    is, and if you look at this thing, this recitation they have  
9    shown from John Palastra at the eleventh hour, they spend a  
10   lot of time telling me why they can't produce this financing  
11   arrangement.   So I'm interested in this now, and that's why we  
12   have asked for it, and they are stonewalling us.   Just what is  
13   the harm of them telling us what is the name of the  
14   third-party company?   Give us the contract they have with  
15   them.   That's it.

16              THE COURT:   You asked for more than that.

17              MR. BRUCE:   Well, no, I will throw a subpoena on  
18   them.   I will deal with them.   Just the contracts or  
19   agreements with any third-party entity, any type of financial  
20   relationship to sell the machine.   I will go deal with them  
21   myself.

22              MS. LONG:   I don't think counsel can complain that we  
23   don't give enough burden facts on the one hand, and then on  
24   the one place where we were able to, in a week, able to get  
25   together our burden facts, complain that we have provided too

1 many burden facts. It is a bit confusing there.

2 But we don't, to my knowledge, have a single  
3 party -- or, no, we don't, I will say that, have a single part  
4 about finances.

5 As is laid out in the declaration from  
6 Mr. Palastra --

7 THE COURT: Where is the -- what's the -- give me the  
8 declaration.

9 MS. LONG: 117-1.

10 THE COURT: This stack.

11 MS. LONG: It is on the bottom of Page 2 and at the  
12 top of Page 3. He makes clear in Paragraph 14 that "Each  
13 customer who finances can use whatever financial institution  
14 they choose."

15 MR. BRUCE: And I don't dispute that, Judge. They  
16 have got a special arrangement with an entity, and if we have  
17 to peel back, and I have to spend a lot of time and money  
18 doing that, when they can just tell me who it is -- I'm not  
19 saying that they can't finance it. This is a nonanswer. I  
20 didn't ask that question. I know that. I know that.

21 The question I have is "Do you guys have an agreement  
22 or contract with some entity that you have set up to help  
23 finance your customers, that you would steer them to?" That's  
24 what I want to know.

25 Now I'm curious. Why are they --

1 MS. LONG: The request is much broader than "Do you  
2 have a special company that you have some sort of special  
3 relationship with?"

4 THE COURT: Well, he is limiting it now. Mr. Bruce  
5 is a good guy. He is a smart attorney. So what he is doing  
6 is he realizes he was going to lose on what he asked for, so  
7 he is scaling it back. He is trying to get something out of  
8 it.

9 MS. LONG: He asked for any third party --

10 THE COURT: He has already dumped that. He is not  
11 asking for that. Now he is peeling it back. That's the whole  
12 Rule 37 discussion.

13 MR. BRUCE: Mr. Samore said he would not amend any  
14 answer, so that ended it, and that is the truth.

15 THE COURT: Let me read. Let me read.

16 (Brief pause.)

17 THE COURT: All right. I will only require, if it  
18 even exists, any contract with a third-party financing company  
19 for customers that purchased the PicoSure product.

20 MR. BRUCE: Thank you, Judge.

21 THE COURT: That's it.

22 I think that's the end of my documents. Anything  
23 else?

24 MR. BRUCE: No.

25 THE COURT: Okay. Mr. Samore, we were talking

1     about --

2                 MR. SAMORE:   And I believe this should be short  
3     because there was no response to this motion.

4                 THE COURT:   All right.

5                 MR. SAMORE:   It was our motion to compel evidence to  
6     direct damages, namely the revenues from the PicoSure machines  
7     that they -- the Plaintiffs purchased.   The Plaintiffs, you  
8     may recall, agreed to limit their theory of damages to direct  
9     damages.   Direct damages is the difference between the value  
10    of the goods as represented versus the value as delivered.

11                One of the factors in determining the value of a good  
12    as delivered is the revenue that it generated.   This is  
13    recognized by the case precedent, by expert affidavit that we  
14    have attached, and the professional literature, authoritative  
15    literature, and by one putative class member who testified  
16    with respect to the importance of the revenue data for  
17    evaluating whether or not to purchase the PicoSure.

18                The Plaintiffs didn't respond.   This concerns  
19    Interrogatories 11 and 12 and the Production Request No. 14.  
20    We would ask that these interrogatories and this production  
21    request be complied with.

22                THE COURT:   Go ahead.

23                MR. HOLEVAS:   Your Honor, Mr. Bruce and Mr. Gravino  
24    have taken the laboring oar on the other discovery items, so I  
25    was asked to review this.

1           First and foremost, Judge, it was my understanding  
2   that this was noticed for presentment. I don't think there  
3   was ever contemplated that there was going to be any formal  
4   response submitted as of today's date. But notwithstanding  
5   that, Judge, and we can respond to it if the court believes  
6   that it is necessary, I reviewed your Document No. 81, the  
7   minute order that you had entered on the 15th of August of  
8   2016, where you already dealt with this issue.

9           THE COURT: Yes.

10          MR. HOLEVAS: So I didn't know if this was some type  
11   of a motion for reconsideration that has now been filed about  
12   eight months after you had previously ruled. I note with  
13   great interest that you --

14          THE COURT: There was comments repeatedly about a  
15   motion for clarification or something like that, and I know I  
16   had ruled on it, and it sounded very familiar.

17          MR. HOLEVAS: Right. That's why we were --

18          THE COURT: So when I read this, I didn't know what  
19   we were doing on it.

20          MR. HOLEVAS: We had the same confusion, your Honor,  
21   because I think it has already been addressed by this court.  
22   Nothing has changed, and I think the court very astutely  
23   indicates in your order that "Defendant, despite having  
24   several opportunities in the many briefs offered in the course  
25   of cross motions, has provided no counter authority, and this

1 court's research disclosed none."

2 Judge, the two declarations that they attached to  
3 their motion, one that counsel has already alluded to, and I  
4 think his co-counsel has indicated that there was some e-mails  
5 from that declarant that they are going to have to provide  
6 within the next 14 days, obviously, we don't have any of that  
7 information to review.

8 THE COURT: Isn't this just a gussied-up motion to  
9 reconsider? Instead of taking me on, you are pointing the  
10 finger at them and saying they didn't do something, instead of  
11 saying, "Judge, you screwed up."

12 MR. SAMORE: No. Your Honor, I think that what  
13 happened procedurally was that in their complaint, they sought  
14 consequential damages, and we requested this information  
15 because it was relevant to consequential damages. Then at the  
16 hearing, and very confusing, they went back and forth, but  
17 they withdrew their claim for consequential damages.

18 THE COURT: Mr. Bruce did it explicitly, multiple  
19 times.

20 MR. SAMORE: Well, they -- it was confusing in their  
21 responses, and I think that that's a side point. They  
22 withdrew their claim for consequential damages for the first  
23 time at that hearing. That is not in the record anywhere  
24 else. Whether this is a motion to reconsider --

25 THE COURT: Other than a transcript?

1           MR. SAMORE: -- whether this is a motion that's up,  
2   you know what you meant by the order, and if you believe this  
3   was dealt with, then it is a motion to reconsider.

4           THE COURT: Look, you are the one that put the  
5   caption on it. You tell me what you want me to do. But you  
6   can't ask for a motion to reconsider my ruling and point a  
7   finger of blame at them for not responding to a discovery  
8   request if I have already ruled on it saying it is not  
9   relevant. Just tell me if you think I'm wrong. If you think  
10   I'm wrong --

11          MR. SAMORE: Well, I think that you are wrong, that  
12   your order dealt with the issue of direct damages.

13          THE COURT: All right.

14          MR. SAMORE: And I defer to your Honor, but so far as  
15   it dealt with direct damages, the order was erroneous.

16          THE COURT: Because you didn't cite anything. How  
17   could I be wrong if you don't tell me any authority? That  
18   makes it really hard.

19          MR. SAMORE: Because before the hearing, before the  
20   hearing, there was a simple motion because they were seeking  
21   consequential damages.

22          THE COURT: Right.

23          MR. SAMORE: Revenues clearly would be relevant to  
24   consequential damages. At the hearing, they announced that  
25   they are not seeking consequential damages.



1           THE COURT: Look, it is not set for presentment. Do  
2 you want to file a written response?

3           MR. HOLEVAS: Your Honor --

4           THE COURT: So that's why -- I remember I looked at  
5 it, I read it, and I went, "Huh, there is no response," and I  
6 looked at it, and I went "This smells like a motion to  
7 reconsider, gussied up as a motion to compel."

8           MR. HOLEVAS: Precisely, and that's why we did not  
9 file a response because we needed to have some clarification.

10          THE COURT: Well, there was no presentment.

11          MR. HOLEVAS: Your Honor, with all due respect, I  
12 think you have already dealt with this issue. Counsel has  
13 alluded to, and I think his co-colleague said, death by a  
14 thousand cuts. Why are we going back now and retreading  
15 damage issues that you have already dealt with back in August?  
16 There is a lot of work that both parties need to do here, and  
17 I would submit to you that the transactional costs involved  
18 and the court's time to readdress a motion that you have  
19 already decided on is not in the best interest of anyone.

20          So if they want to withdraw it without prejudice, and  
21 if it becomes an issue at some later date, perhaps. But at  
22 this stage right now, to go back and rework this issue that  
23 you have already decided, without any additional new  
24 authority, I just don't understand why we would be required to  
25 do that.

1 THE COURT: Okay. Mr. Samore?

2 MR. SAMORE: Yes. Okay. I think when a party amends  
3 their pleading at the hearing, in which you base your ruling  
4 on, to withdraw the claim, that they have changed the color.  
5 We are responding to their claim now with respect to direct  
6 damages. Before we were responding to consequential damages.  
7 This is directly relevant. There is no dispute, I don't hear  
8 anything from either your Honor or from Plaintiffs, that the  
9 revenue that an asset produces is relevant to its value.

10 We have produced an affidavit, a detailed affidavit,  
11 from a putative class member that talked about the importance  
12 of this. We have produced a CPA affidavit talking about an  
13 asset cannot be viewed in a vacuum. It has to be viewed by  
14 the revenue that it produces.

15 We certainly -- if you believe it is a motion to  
16 reconsider, we will style it as a motion to reconsider. We  
17 will file a motion to reconsider, but I would like this -- I  
18 would like a ruling clearly and squarely on this issue.

19 THE COURT: I have ruled clearly and squarely on this  
20 issue a long time ago. We have got a procedure. Look, you  
21 can file motions to reconsider. I don't have any real hard  
22 statistics, but motions to reconsider, generally not granted.  
23 They can be. I mean, we all make mistakes, and I have  
24 reconsidered things, but they are generally not granted.

25 One of the great things about the system we have here

1 is if you don't like something I do, Judge Kapala loves  
2 getting objections, and you can file an objection, and he can  
3 tell me I'm wrong.

4 MR. SAMORE: Okay. We will be happy to do that,  
5 then, your Honor.

6 THE COURT: So you blew your 14 days on that, so I  
7 don't know how happy you are.

8 MR. SAMORE: This has changed the case complexion.  
9 Your Honor has allowed them --

10 THE COURT: If you want to file a motion to  
11 reconsider, file a motion to reconsider, but this is a motion  
12 to compel the Plaintiffs to do something that they are under  
13 no burden to do.

14 MR. SAMORE: I will be happy to do that. I will be  
15 happy to do that.

16 THE COURT: We have got different standards. We have  
17 got -- okay, a motion to reconsider has a different standard  
18 and Rule 37 has a different standard. It needs to be  
19 presented, and it needs to be put forward to the court in the  
20 proper procedural light, because where you start often  
21 determines where you end, okay?

22 MR. SAMORE: Okay.

23 THE COURT: So I will deny it without prejudice.

24 MR. SAMORE: Okay. And what we will do is we will  
25 file this the way it is or in the alternative for a motion to

1 reconsider. I don't think the issue is the same.

2 THE COURT: No, here is what I'm going to do: I'm  
3 denying this without prejudice. You can do whatever you want  
4 to do, okay?

5 MR. HOLEVAS: Thank you, your Honor.

6 MR. BRUCE: Thank you.

7 MR. GRAVINO: Thank you, Judge.

8 (Which were all the proceedings heard.)

9 CERTIFICATE

10 I certify that the foregoing is a correct transcript from  
11 the record of proceedings in the above-entitled matter.

12 */s/ Heather M. Perkins-Reiva* *April 17, 2017*

13	_____	_____
	Heather M. Perkins-Reiva	Date
14	Official Court Reporter	

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